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S. HRG. 103-219

THE NATIONAL ENVIRONMENTAL POLICY ACT AND THE NORTH AMERICAN FREE TRADE AGREEMENT

Y 4.P 96/10:S.HRG.103-219

The National Environmental Policy A...

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

JULY 22, 1993

Printed for the use of the Committee on Environment and Public Works

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THE NATIONAL ENVIRONMENTAL POLICY ACT AND THE NORTH AMERICAN FREE TRADE AGREEMENT

THURSDAY, JULY 22, 1993

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 9:35 a.m. in room 406, Dirksen Senate Office Building, Hon. Max Baucus [chairman of the committee] presiding.

Present: Senators Baucus, Reid, Chafee, Boxer and Simpson.

OPENING STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Any discussion of the National Environmental Policy Act, otherwise known as NEPA, goes to the heart of this committee's purpose.

In the past, in 1969, NEPA marked the beginning of the modern environmental era. The National Environmental Policy Act is short and sweeping in its breadth, and its stated purpose is to "encourage productive and enjoyable harmony between man and his environment."

In language that anticipates the present discussions of sustainable development, NEPA proposes to "create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations of Americans."

But this is 1993, and our understanding of the environment has grown. The immediate stimulus for this hearing Judge Charles Ritchie's thought-provoking decision of several weeks ago. He held that NEPA requires the administration to complete an environment impact statement, or an EIS, on the North American Free Trade Agreement before submitting it to Congress.

The decision raises important questions about the relations between Congress and the Executive Branch.

To see the environment impacts of a trade agreement you need only go to the U.S./Mexican border. In the 1960's, the United States and Mexico negotiated an agreement granting U.S. companies tariff concessions if they assembled products in Mexican border plants for reexport to the United States.

These maquiladora industries were subject to little or no environmental regulation, and the population growth they fostered out-

paced any attempt to provide municipal services like wastewater treatment.

The sad part is it doesn't have to be this way. Environmental ruin is not an inevitable result of economic development. Avoiding environmental harm takes foresight, and that takes us back to NEPA.

The National Environmental Policy Act's EIS process never mandates environmentally sound courses of action. It simply requires that we examine the environmental effects of proposals and consider alternative, less environmentally damaging means to the same end.

NEPA's regulations state that the purpose of an EIS is to "serve as an action-forcing device" and to provide a "full and fair discussion of significant environmental impacts."

It works on the presumption that when presented with the alternatives society will choose less harm to the environment. And NEPA has worked. It relies on a simple principle: before we act, we must stop and think.

The simplicity has made it flexible, and it has been good for the environment. And there is no reason that we should not stop and think about the environmental implications of trade agreements, whether or not a formal EIS is required.

This is our objective for trade agreements. We must understand our alternatives and balance the interests of growth and sustainability.

These issues raise a series of questions. What environmental information is needed for the negotiation and evaluation of a trade agreement? Who needs the information? When do they need it? And how do we make sure that the information is available?

These are the questions we will begin to address this morning.

I welcome our distinguished panel, with the wealth of knowledge and experience you all bring to the discussion. I trust that with your help we will leave this room with a deeper understanding of the issues.

I, for one, believe there are no more important environmental issues than the one we are examining today. Establishing the trade environment link is critical, and that is why I will not support the NAFTA unless the environmental side agreement is strong and enforceable.

We must strengthen the trade/environment link in the future, and that strengthening process is what we are beginning today. This will not be the last time we will discuss this essential issue—that is, the nexus that converges between trade and environmental issues. There will be many other forums in which this issue is discussed. And I believe that the hearing this morning is a very good start as we begin to better understand that linkage and better know what actions we should take as a consequence of it.

Now I would like to turn to the ranking member of the committee, Senator Chafee.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. Thank you very much Mr. Chairman.

I want to express my appreciation to you for holding this hearing.

Let me just say a couple of words about what this hearing is about. It is not solely about the Judge Ritchie decision, and it is not about the North American Free Trade Agreement, per se.

It seems to me that the debate isn't whether the environment should or should not be a consideration in trade negotiations because, frankly, that argument is moot. I want to emphasize that point.

Today the environment is a factor in trade negotiations, and that's not going to change, whether or not Congress gets involved. The environment is here to stay. It has a permanent role as a key factor in trade policy debate, and I think that's a healthy sign.

What the Ritchie decision and the NAFTA situation have done is to act as catalysts in bringing to Congress' attention an underlying issue, which is: should there be a formal mechanism or requirement whereby future trade agreements are evaluated for their environmental impact? If so, what should that mechanism be and how should it be structured?

These aren't very simple questions, by a long shot; nor are they familiar ones to us. Thus, it seems to me we shouldn't rush to enact rules that later we may find too inflexible or perhaps not suited to the question or the situation before us.

So I think we ought to move with care, keeping in mind our goal and giving due consideration to past experience and our expectations for the future.

Perhaps past experience can give us some guidance, although the experience from which we can draw on is limited—limited to the 1895 U.S./Israel Free Trade Agreement, the 1988 U.S./Canada Free Trade Agreement, NAFTA, and, of course, GATT.

Each of these agreements is unique. Each was constructed to apply to a very specific and distinct situation. And none was subject to formal environmental review requirement. In fact, to my knowledge, NAFTA is the sole agreement during whose negotiation the environment received significant consideration. Ms. Bello and others can correct me if I am wrong there, but I believe, as I said, that in the course of NAFTA negotiations it is the only agreement where the environment receives significant consideration, and whose text clearly reflects that fact.

In NAFTA the consideration was taken not as a result of any legal requirement, but by mutual agreement and understanding between Congress and the President.

Among our witnesses today are those with direct experience—Ms. Bello and others—in negotiations in connection with NAFTA, and their thoughts are going to be very useful.

I think we need to hear frank assessments on how each witness believes we can best reach the common goal—which common goal I believe is ensuring that environment implications of trade agreements are considered.

I look forward to hearing the witnesses.

Senator BAUCUS. Thank you very much, Senator.

Next is Senator Reid.

OPENING STATEMENT OF HON. HARRY REID, U.S. SENATOR FROM THE STATE OF NEVADA

Senator REID. Mr. Chairman, thank you very much.

I'm going to go shortly to the Joint Committee to reorganize Congress. If there were ever a reason for doing that, it's my schedule, and I'm sure everyone else's schedule today. I am to be three places now.

I'm not going to be able to stay and listen to this great panel that you have put together, which I think is one of the most important things that we could be doing today.

Hopefully when the joint committee comes back maybe some of our assignments will be limited. One of the things we are working on is limiting the number of committees that Members can be on—which I know, Mr. Chairman, you serve on a lot of them.

Of the many oversight responsibilities this committee is charged with, certainly this policy tool, NEPA, should be high on our list. Perhaps more than any other statute, NEPA provides our Government with a working structure by which we review our environmental activities and perform checks and balances in how our environmental statutes are working. Of course, this should be high on our list.

Since NEPA was passed more than a quarter of a century ago, there has been little actual review or oversight of the statute, itself. Yes, it has been applied and relied on by many as the directional signal by which we have driven our environmental policy but, frankly, we seem to have been more concerned as a legislative body and in this committee with passing additional regulations rather than performing any serious review of oversight of the existing ones.

To your credit, Mr. Chairman, you have raised in numerous hearings already this year the fact that we need to step back and take stock of what we have done to effect an environmental agenda for our country. Without the past efforts of this committee and Congress, in general, we could not have moved forward with the pace we have, I think, on the environmental front.

Nevertheless, from time to time one must step back from the process to see where we have been and where we are headed.

The National Environmental Policy Act established a review process we know as an EIS or Environmental Impact Statement. It has also created the Council of Environmental Quality and set the stage for citizen appeals on major environmental policy decisions.

In the past few months, we have found ourselves faced with the alternative of eliminating the CEQ—a decision that some question—receiving a Federal judge's opinion suggesting that NAFTA is subject to an EIS under NEPA, and hearing testimony last week in this committee by former EPA Administrator Ruckelshaus and others about the problems created when environmental policy is made in the court system.

Does all this mean that NEPA isn't working? No, I don't think so. But it does suggest that it is appropriate that this committee take a long, hard look at NEPA to see, as we are doing with other environmental legislation, what is working and what is not working.

It is my intention in the coming months to hold hearings in my subcommittee, which has original jurisdiction over NEPA, to inquire as to what will happen to the NEPA review process in the absence of the CEQ, and to further inquire as to the cost of litigation and policy implications that arise from the citizen appeal process under NEPA.

As a society, we must always preserve the right to ask how the decisions we make at the policy level affect the environmental quality of our lives. The costs that flow from environmental degradation are monumental, and the drag on our economy that results from these costs is staggering.

We also have an obligation to search for the best solution to protecting the environment while encouraging economic growth.

Many people are discussing the dynamic of this relationship, Mr. Chairman, but at some point we must take action to ensure that we move in this direction.

Again, I commend you for this initial step in looking at the NEPA process. I look forward to working with you in the future on other aspects of this major environmental statute.

Senator BAUCUS. Thank you very much, Senator. We look forward to the work of your subcommittee, too, I assume examining not only the NEPA issue, as you mentioned, but, to a large respect, this one, as well.

Senator REID. That's right.

Senator BAUCUS. Thank you.

Senator Boxer?

OPENING STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Thank you very much, Mr. Chairman. I would like to thank you for holding this hearing to further illuminate the difficult environmental issues presented by the North American Free Trade Agreement and the recent Federal Court decision in the case of *Public Citizen* v. *Office of United States Trade.*

I am very concerned that there is a real chance for environmental degradation under the current NAFTA. I am concerned that in its current form NAFTA may actually undermine Federal environmental laws and promote environmentally detrimental investment.

I am also concerned that the current NAFTA text could be used to attack State environmental standards as illegal barriers to trade, doing significant damage to the States' ability to protect the environment and their own citizens. In my own State, we passed proposition 65, which very vigorously controls the use of pesticides. I am not at all satisfied that would stand up if NAFTA isn't changed dramatically.

Finally, I am not convinced that the current NAFTA adequately addresses the existing environmental disaster along the U.S./Mexico border. I believe that long-term, sustainable trade must be based on sound environmental protection principles, and therefore am very interested to hear from today's distinguished witnesses as to how they view the question of applying the National Environmental Policy Act to NAFTA and to trade agreements generally.

I am concerned that the law suit that led to Judge Ritchie's decision in the public citizen case, regardless of whether that decision is upheld on appeal, points to the fact that inadequate care has been given to the environmental consequences of NAFTA.

Mr. Chairman, almost a year ago, as a Member of the House of Representatives, I supported the citizens trade resolution H. Con. Res. 256, which states,

The Congress will not approve legislation to implement any trade agreement if such agreement jeopardizes United States health, safety, labor, or environmental laws.

That resolution passed the House by a vote of 362 to 0. I believe the resolution states an important principle and one to which we should remain committed.

Again, I thank you for your leadership on this issue.

Senator BAUCUS. Thank you very much, Senator.

I would like to turn to the panel.

We have this morning, I think, a very distinguished group of Americans who know this subject quite well from different perspectives.

First we will hear from Mr. Nicholas Yost, who has a very distinguished career as an environmental lawyer. Under President Carter he served as General Counsel to the Council on Environmental Quality and helped shape NEPA, and is in a natural resource practice today.

Ms. Judy Bello is an attorney, many of us on this committee who also serve on the Finance Committee involved in trade matters are very familiar with the excellent work of Judy Bello when she was with the USTR. She knows this subject very well from a trade perspective.

Doctor Lawrence Tribe—I don't know any Constitutional lawyer better known than Professor Tribe of Harvard. Professor Tribe has written extensively. He has argued many cases before the Supreme Court.

I may be wrong, Mr. Tribe, but it is my recollection that no one has a higher success rate before the Supreme Court than you. We are very honored to have you here.

We also have Mr. Schlickeisen, who is President of Defenders of Wildlife. I have known Mr. Schlickeisen for a good number of years. In fact, I know him very well because he was my Chief of Staff not too many years ago.

Mr. SCHLICKEISEN. The most distinguished part of my career.

Senator BAUCUS. Right. We are very happy to have you back here, Roger.

Ms. Kathryn Fuller is very well known to all of us as President of World Wildlife Fund. Ms. Fuller is very active in world environmental issues and, I think, the largest national environmental organization in this country, which attests to her leadership in the issues that she is involved with.

We are very happy to have you here, Ms. Fuller.

Let's begin with you, Mr. Yost. I guess we'll just go down the table here.

STATEMENT OF NICHOLAS C. YOST, ATTORNEY, DICKSTEIN, SHAPIRO & MORIN

Mr. YOST. Thank you, Mr. Chairman and members of the committee, for inviting me to testify today on the subject of NEPA and trade agreements.

It is always a pleasure to be back before this committee, with its distinguished tradition of bipartisan, enlightened attention to the Nation's environmental concerns.

I gather that your invitation to me was occasioned, in part, by my having been as governor Councel or CEQ, the draftsperson of the NEPA regulations which the Federal Government follows and has followed since the Carter Administration.

By way of further disclosure of where I am coming from, I consider myself an environmentalist. I am a supporter of NAFTA. I agree with the administration's policy of seeking NAFTA approval coupled with certain environmental and other side agreements. But, as you will see, I also believe that it is possible to have both NEPA compliance and timely Congressional action on NAFTA.

Before getting into the substance, let me make a couple of brief observations.

First, NEPA is a law which originated in the Congress. The EIS was created by the Senate—specifically, by the late Senator Henry Jackson and his staff and advisors—and John Dingell carried the bill in the House. It was imposed upon an unwilling Executive, and that reluctance to follow NEPA I think has been there through all its history.

Second—and I will summarize as I go along—let me emphasize the wisdom of Congress in enacting NEPA. As you said, Mr. Chairman, it really is a law which requires Federal agencies to look before they leap environmentally, and that's good policy.

Now on to substance.

What does NEPA require? In the statute's words, it requires an EIS on "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."

I would think the language of the Congressional enactment particularly clear—if an Executive Branch proposes legislation or other major Federal action which may significantly affect the quality of the human environment, an EIS is to be prepared.

I would have thought that the process by which the Executive proposes NAFTA or other trade agreements to Congress for approval is a proposal for legislation. If not, it certainly is caught up in the catch-all phrase of "other major Federal action."

May a trade agreement such as NAFTA have a significant environmental impact? I would think, given the debate on the subject, that it is fairly evident that it will. If so, an EIS must be prepared.

In short, under NEPA a trade agreement presented by the Executive Branch to Congress for approval requires an EIS. I think the district court's decision in that regard was a sound one.

Having asserted the bottom line of what the Congressional enactment requires, let me back up a bit and go into some detail, and particularly to concentrate on what should be done now.

In short, I believe it is possible to have our cake and eat it, too—to prepare an EIS which would be helpful to you in Congress and

to the public in a time frame compatible with the President's intentions for approval of NAFTA this year. Let me elaborate a bit.

First, EISs on international agreements are nothing new. Environmental impact statements have been prepared on at least a dozen treaties and other agreements, including the Panama Canal treaty, the Montreal Protocol on Substances that Deplete the Ozone Layer, and the Start Treaty.

By way of further elaboration, the Department of State prepared EISs on treaties or conventions in the Nixon, Ford, Carter, and Reagan Administrations, and DOD did so for Start in the Bush Administration.

To repeat, EISs on international agreements with significant environmental impacts are nothing new. What I find extraordinary is why, given the environmental debate surrounding NAFTA, no EIS was prepared on it quite some time ago.

Second, I understand that both our co-signers of NAFTA, Canada and Mexico, have prepared environmental impact assessments on NAFTA. The former is a public document, the latter is not.

And I might add that I have reviewed the Canadian environmental assement and it is a particularly fine document which could be of real assistance.

Third, the CEQ NEPA regulations specifically provide that "proposals for legislation" are to include the ratification of treaties.

By way of accelerated process, those regulations provide for what is called a legislative EIS designed for this sort of situation to be geared to the timing of what is happening in Congress. It does not go through a draft and final EIS, but is a one-stage EIS. It omits the usual scoping process. The EIS may follow transmittal to the Congress of the legislative proposal by up to 30 days.

So, given all the work that has been done, although not coherently assembled for Congress and the public, with respect to the environmental implications of NAFTA, it is my opinion that a legislative EIS which is thorough and useful to the Congress and the public, which will coherently inform the public debate on NAFTA's environmental implications can be prepared in six to ten weeks.

The EPA has prepared other studies in the past, including an over 200-page evaluation of NAFTA, which will be of enormous assistance in doing this. The Canadian environmental review of NAFTA can also be most helpful.

In short, however, I believe that if work is begun, it must be begun now, and the Government can prepare a credible and useful EIS that will enlighten Congress and the public on the environmental impacts of NAFTA. An EIS could be prepared and submitted to Congress some time between September 1 and October 1. The NAFTA proposal could be submitted some 30 days earlier, which is to say some time between August 1 and September 1. That's adequate time to allow NAFTA to come into effect as planned on January 1, 1994.

Senator BAUCUS. I'm going to have to ask you to summarize the best you can.

Mr. YOST. I will leave in my statement matters on such issues as separation of powers and so on, and won't go into those, but will conclude by asking whether this the ideal situation of NEPA compliance here? Of course not.

When we revisit this issue on other trade agreements, hopefully an EIS process can be started earlier, an initial assessment done, then the tiering process used to follow the trade agreement as it goes along in such a way that it is not a one-shot evaluation but a continuing evaluation with opportunity for public input.

As we move toward a more sustainable future in which trade will play a significant part, NEPA can help guide the way and ensure that environmental sensitivity accompanies expanded trade.

Thank you very much.

Senator BAUCUS. Thank you very much, Mr. Yost.

Ms. Bello?

STATEMENT OF JUDY BELLO, ATTORNEY, SIDLEY & AUSTIN

Ms. BELLO. Thank you, Mr. Chairman, Senator Chafee, Senator Boxer. I am very pleased to be here this morning to share my ideas on how best to reconcile two of America's most important objectives—promoting economic growth and job opportunities through trade, and also protecting the environment.

I have submitted a detailed statement for the record, and I will very briefly summarize my remarks.

I will not limit my focus to the June 30th decision, but I would like to make my position quite clear, and that is I think the Public Citizen decision is bad law. I think the court lacks jurisdiction in this particular case, and I also think that the court has violated the Constitutional separation of powers. I'd be happy to expound on these views and debate them with some of my colleagues here in the question and answer period that follows. Basically, in my view, there is no final agency action here, and the Supreme Court precedent just last year of *Franklin* v. *Massachusetts* is dispositive. This is action by the President of the United States, and in the circumstances of NAFTA actually two Presidents of the United States. The USTR plays a very important role, but it was a President who initiated these negotiations, it was a President that made all of the critical decisions, it was a President who signed the agreement on December 17th, and it is the current President who will decide if and when to submit a bill to the Congress to implement this agreement. Such final action by the President, under the clear, decisive precedent of *Franklin* v. *Massachusetts*, is not subject to judicial review under the Administrative Procedure Act.

I further submit that the court lacks jurisdiction because I believe the plaintiffs lack standing. They have an interest in the NAFTA and the bill that will, in the future, be developed to implement it to be sure, just as we all do. But NAFTA affects all Americans and, if implemented, of course, all Mexicans and Canadians, as well. In my opinion, it affects us all, on net, vastly for the better. Also in my opinion, plaintiffs' averments of harm stemming allegedly from the NAFTA are based upon misreadings and misinterpretations of the agreement which clearly, unquestionably, unequivocally protects the sovereign right of the United States to establish those environmental standards that we consider to be appropriate, at whatever levels of protection be consider appropriate to protect the environment of our country and the health and safety of our citizens, of our plants and animals.

I also believe that the plaintiffs' averments of harm are based on the notion of quite speculative and remote events which are not directly traceable to NAFTA, but rather are attenuated.

For these ample jurisdictional reasons, I am optimistic that in the expedited appeal underway, the decision of June 30 will be reversed.

My preference, however, would be that the court would address not only these jurisdictional bases, but would go on to address the fundamental Constitutional separation of powers issue. I will not belabor this because, as you made clear, Mr. Chairman, I was asked to appear because of my trade expertise and not because of my Constitutional expertise, which job more rightly falls to the panelist to my left, Dr. Tribe.

In the long line of decisions, though, construing the President's Constitutional powers to conduct the foreign affairs of the United States, I would like to mention one. It is my personal favorite because it is a transportation case, and I began my Government career as a transportation lawyer at the Department of State.

The case is *Chicago & Southern Airlines* v. *Waterman Steamship Corporation*. It was a case in which a disgruntled airline, unhappy because one of its competitors was awarded route rights overseas, complained and sued under the Civil Aeronautics Act of 1938, which expressly provided for judicial review of certain orders of the Civil Aeronautics Board. The court held, nonetheless, that in the circumstances there, which also involved foreign commerce (which obviously therefore involves the Congress under article I of the Constitution), that there was no applicability of that statutory provision to orders of the Civil Aeronautics Board subject to the approval of the President. The court wrote, in short: "The very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

In brief, Mr. Chairman, I think the *Public Citizen* decision it is bad law and, more importantly, bad policy. I think it is bad policy essentially because, in my judgment as a former trade negotiator, to subject fast-track, comprehensive trade agreements to NEPA environmental impact statements, subject to litigation under the Administrative Procedure Act, is to derail them. Without trade agreements, we would be far less competitive in the global market. The result would be fewer exports, fewer jobs, slower economic growth, a diminished future for America and, I believe, a less well-protected environment.

Mr. Chairman, I couldn't agree with you more that we need to stop and think about the environmental consequences of trade negotiations and agreements. I submit that USTR, in the past, with respect to the NAFTA agreement, as the Ranking Member indicated, has begun to do so, and in the future, will continue to do so. This process can be improved but, in my judgment, it cannot be improved through litigation through the courts.

These decisions are political decisions which must and should be made by the political branches of Government, which are the Congress under its Constitutional power under article I to regulate commerce and make the laws, and the President under his Constitutional power under article II to conduct the foreign affairs of the United States.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Bello follows:

Senator BAUCUS. Thank you, Ms. Bello, for that very strong, forceful statement.

Ms. BELLO. Did I make myself clear?

[Laughter.]

Senator BAUCUS. No. Would you repeat it, please?

[Laughter.]

Senator BAUCUS. Professor Tribe?

STATEMENT OF LAURENCE TRIBE, TYLER PROFESSOR OF CONSTITUTIONAL LAW, HARVARD LAW SCHOOL

Mr. TRIBE. Thank you, Mr. Chairman.

I don't know if I will be as forceful as Ms. Bello. She certainly has a clear perspective on this.

I thank you for holding this hearing and for inviting me. I hope my full statement can be introduced. Rather than reading from it or even summarizing it, I want to say a couple of fundamental things.

I do want to say that, although I guess I am on the same side as Ms. Bello in terms of agreeing that Judge Ritchie was simply wrong, I disagree with much of what she said both about why he was wrong and about the policy issues.

I, too, favor free trade, but I think that the survival of the earth is an enormous priority and we do have to find some way to factor environmental concerns in.

I think back in 1969, as NEPA was being enacted, I taught the first environmental law course in the country, so I do believe strongly in environmental concerns.

I also am a pretty strong proponent of Congress' power vis-a-vis the President. I have typically defended Congress' authority to restrict Executive power, and most people don't think that I have too narrow a view of judicial authority. Indeed, many people would, I think, come to the opposite conclusion.

Nonetheless, I think that the district court's decision of this June 30th ordering the President's trade representative to produce an EIS on NAFTA before the President submits NAFTA to Congress clearly violates the Constitution's separation of powers and clearly ought to be reversed.

Unlike Ms. Bello, I am not at all confident that it should be reversed on narrow and technical grounds. I do think that a strong case can be made that the plaintiffs have standing, and I think a strong case—though this is a closer question—can be made that there is final agency action, even within the meaning of *Franklin* v. *Massachusetts*.

I think where the district court went wrong—and I think clearly wrong—was in using the sweeping words of NEPA—which is,

indeed, written as broadly as Mr. Yost describes—using words penned by the 91st Congress to support a judicial action that intrudes without any Constitutional authority into two of the President's core Constitutional powers and responsibilities and, I think, as well, into one of Congress' most fundamental powers.

I think, in fact, it is a clearer case even than the Waterman case, though I agree with Ms. Bello that Waterman is strong authority.

The Presidential powers with which the district court interfered here were, first, the power to negotiate agreements with foreign governments on behalf of the United States and, second, the power and duty under article II, section 3, to recommend to Congress' consideration such measures as he shall judge necessary and expedient.

Now, Judge Ritchie saw no interference with the foreign negotiation power because he said NAFTA has already been negotiated and approved by the three nations involved. Although I like Judge Ritchie and respect him, I think that is sheer sophistry. It is like saying that a judicial order enjoining a wedding does not interfere with the couple's decision to marry, provided the injunction is issued only after the couple gets engaged.

There is no doubt at all that this kind of judicial intrusion would have a huge prospective impact on the ability of foreign governments to assume that we will be on whatever fast-track we purport to be on, and therefore to take our negotiating posture seriously.

Second, as far as the President's power and duty to recommend Congressional approval of NAFTA is concerned, Judge Ritchie's opinion doesn't say much about it at all. It comes down to four points, and I want to address each of them before making what I hope might be some constructive recommendations.

First of all, he says this is only a domestic matter. Just to say that I think is to refute it. We all know it is not only a domestic matter. And, anyway, it is Constitutionally irrelevant. The President has the power and the duty under article II to propose measures to the Congress. The question of whether those measures, once negotiated, can all be located and physically cabined here on Capitol Hill doesn't have anything to do with it.

Second, Judge Ritchie reasoned that this is not a major intrusion since, after all, an environmental impact statement can be prepared. That was, I think, the gist of what Mr. Yost was saying.

I don't purport to be an expert on whether it could be done in six to ten weeks, whether it ought to be done, or whether, as Judge Ritchie tries to do—he tries to say, "Look. I'm not blaming President Clinton. I'm blaming President Bush. He should have done it." I don't think that's a judge's business, frankly. And it seems to me that the issue isn't who should have done it or if it can be done; the issue is one of Constitutional structure.

Important as the environment is, I think we have to preserve it within the structure of Government that is so successful in this country.

Third, he seems to be arguing that if this is an intrusion it is not an intrusion into the work of the President because the order is issued only to the Office of the Trade Representative. But that office is squarely located in the Executive Office of the President and, even more to the point, the Trade Representative serves at the

President's pleasure. The Trade Representative, the head of the OTR, is the President's chief negotiator in trade matters.

Certainly, for purposes of submitting NAFTA to Congress, the OTR is nothing more than the President's arm, the President's mouthpiece. I don't mean to denigrate Micky Kantor, but clearly in this case to accept the argument that you can lop off the President's mouth and his arms is to dismember the Presidency, and I think that would be a Constitutional tragedy.

Fourth, it is argued that the district court is just enforcing the will of Congress which, after all, enacted both NEPA and the fast-track procedure for considering and approving trade agreements pursuant to its article I powers over interstate and foreign commerce.

The problem with that is that it ignores the Constitutional structure through which Congress must enact its will. Congress cannot act by making some sort of judicially enforceable inter-branch treaty or compact with the President under which, in exchange for the President's agreement to do various things like prepare an environmental impact statement, Congress agrees that it will fast-track the President's proposal.

In fact—and this is a point that I think is missed in many analyses of the situation—to treat NEPA and the fast-track procedure that way, far from drawing support from article I, would violate article I because it would enable the Congress that passed NEPA in 1969 and the Congress that passed the fast-track procedure in 1974 to bind the 103rd Congress in 1993, which is clearly impermissible.

I think this shows that the Federal district court in this case invaded the prerogatives of both branches.

Now, it does seem to me that Congress can do some things.

I see the red light is on, so I may just try to put each one in a second or two.

Senator BAUCUS. Briefly, if you could.

Mr. TRIBE. Very briefly.

The first thing Congress can do, of course, is refuse to approve NAFTA if the environmental side agreements are not strong enough. That's strong medicine. You are obviously looking for intermediate possibilities.

The second thing you can do is, in effect, to invite the President through an offer that Congress will go on the fast-track if he decides voluntarily to prepare an EIS. I do not think such an invitation can be transformed by judicial decree into a binding agreement, however.

The third thing you can do is what Congress did quite a while ago when it was not satisfied with the President's assessment of technology. You will recall there was an Office of Science and Technology in the White House, and Congress felt that it didn't have enough of an early warning system. At that time I was heading up a study for the National Academy of Sciences, and we recommended creating the OTA—the Office of Technology Assessment—which puts Congress on a more even playing field.

The time might be right to create an OEA—an Office of Environmental Assessment—either limited to the trade area or broader in space so that Congress is not utterly dependent on the political de-

cisions of the administration with respect to the timing and substance of an environmental impact statement.

I think in that way we can preserve the environment without distorting the Constitution.

Thank you, Mr. Chairman.

Senator BAUCUS. Thank you very much, Professor Tribe. That was a very interesting legal—particularly Constitutional—point.

Let's now turn to Mr. Schlickeisen, who is President of Defenders of Wildlife.

I assume and hope he has some recommendations with respect to trade and environment generally.

STATEMENT OF ROGER SCHLICKEISEN, PRESIDENT, DEFENDERS OF WILDLIFE

Mr. SCHLICKEISEN. Thank you, Mr. Chairman. I'm pleased to be here.

Defenders strongly believes that liberalized trade and environmental protection are not mutually exclusive and can, in fact, be mutually reinforcing. Defenders has endorsed NAFTA, provided some reasonable environmental concerns are met.

In passing NEPA, Congress recognized the profound impact of man's activity on the inter-relations of all components of the natural environment. We believe that if we truly want to come to grips with the root questions of the trade/environment conflict there is no better tool than NEPA.

Defenders strongly agrees with Judge Ritchie's June 30 decision. We believe that USTR is a Federal agency, and that in negotiating NAFTA it is engaging in a major Federal action to produce a proposal for legislation which will significantly affect the quality of the human environment.

I am not a legal expert, but I don't see how the applicability of the language of the statute could be much clearer.

Although the 1988 Trade Act states that it is the President who enters into trade agreements, the reality is that USTR leads the inter-agency process to develop national trade policy. USTR leads the US delegation to negotiate trade agreements. USTR drafts the implementing legislation with Congress. We think you have to look at these actions that are being performed.

This situation is no different from when the State Department negotiates international treaties. While the President is ultimately responsible for a proposed treaty, the State Department is the lead agency and responsible for preparing a related EIS.

Other agencies that have prepared EISs for international agreements or projects include the Departments of Commerce and Interior, EPA, AID, and the Ex-Im Bank.

I also find it very hard to believe, as some are arguing, that Congress intended to waive other statutes like NEPA when it passed fast-track enabling legislation. Fast track is only a Congressional compromise to the traditional trade tensions between the Legislative and Executive branches.

Contrary to some critics, NEPA application to NAFTA will not impinge upon the President's authority to enter into trade agreements any more than it does so for international treaties. It will

not prevent the President from submitting such agreements and implementing legislation to Congress. Further, nothing in NEPA dictates that an environmental assessment need interfere with the time pressures and processes necessitated by trade agreements or fast-track authority.

It would be presumptuous to try to describe exactly how NEPA should relate to trade agreements; however, I will say that we believe that USTR, as soon as possible, should propose rules in the Federal Register that lay out its NEPA obligations with regard to future trade agreements. The State Department long ago promulgated such rules for its treaty-making actions.

As long as the fundamental requirements of the statute are met, NEPA should in no way affect the statutory obligations of USTR. NEPA's provisions are supplementary to those set forth in USTR's existing authorizations. When considered in this light, we see no need for Congress to amend NEPA.

As appealing as a rational NEPA rule-making process for USTR might be vis-a-vis NAFTA, we acknowledge that the timing of the agreement, as well as the legal confusion, suggests a pragmatic solution in this case.

Therefore, like Nick, we propose for NAFTA that USTR prepare a legislative EIS—a less-burdensome environmental assessment specifically allowed by CEQ regulations. An LEIS would cover NAFTA, any supplemental agreements, and the implementing legislation.

The advantages of this approach are that scoping is not required; only one LEIS is generally needed to be drafted and released to the public; public comments must be sought and USTR must forward them to Congress, along with its own responses; and the LEIS can be transmitted to Congress up to 30 days after formal transmittal of a legislative proposal.

I sincerely doubt there will ever be another opportunity for me to question anything Doctor Tribe says, so I will point out that I don't think Judge Ritchie's decision required that the EIS be prepared before NAFTA can be submitted by the President to Congress.

Mr. Chairman, I understand that when the Bush Administration prepared its review of U.S./Mexico environmental issue—work which, because it is available, could relieve most of the burden of preparing an LEIS now—some officials proposed preparing the contents as an EIS. If they had not been overruled, we would not be here today.

I think it is a minor tragedy that a question as big as whether Congress will enforce the application of an important law it wrote to an agency that so obviously should be covered by it is being forced primarily because USTR apparently thinks time is too short.

At its core, NEPA is about important information to the Congress and to the public, and at a time when NAFTA is encountering considerable political difficulty, we believe such information could actually save it. This is the irony.

As the administration is attempting to promote NAFTA, it may also be trying to choke off its best support. Rather than just waiting for a court of appeals ruling that I assume won't come until September, the administration ought to spend the time preparing

an LEIS—something that can keep the NAFTA approval process on track and on schedule.

Thank you.

Senator BAUCUS. Thank you very much, Mr. Schlickeisen.

Ms. Fuller?

STATEMENT OF KATHRYN FULLER, PRESIDENT, WORLD WILDLIFE FUND

Ms. FULLER. Like Mr. Schlickeisen, I will not certainly purport to be a Constitutional or a statutory expert.

In my role as the head of a large nature conservation organization, what I'd like to do is to comment on the kind of environmental impact information the trade negotiators and the Congress need as part of the negotiating process and, equally importantly, as part of the implementation process of any trade agreement.

You have my written testimony, and I'd just like to underscore a few key points.

However the legal question gets resolved with respect to the application of NEPA to NAFTA, we are going to need more. We are going to need added monitoring, added information collection to ensure that the environmental impacts of trade—and, indeed, there are enormous environmental implications from trade that are ongoing right now, with or without the NAFTA—are going to be avoided or mitigated.

I think that the snapshot in time of an environmental impact statement, collecting as much information as is currently available, is simply not going to be enough. We don't know enough. We can't quantify the long-term impacts of all the different patterns of trade at this point.

We need more. And that is why, as you have, Mr. Chairman, we have continued to urge the administration to negotiate a strong supplemental agreement and to support the creation of a strong North American Commission on the Environment to provide an ongoing framework for analysis, for information collection, for impact assessment for the long-term to ensure that the inevitable environment impacts from liberalized trade or from ongoing trade are avoided or mitigated.

In addition, in the immediate term we have the following specific recommendations.

With respect to NAFTA, the administration should commit to publish and distribute a comprehensive document well before the Congressional vote of the positive and negative environmental consequences of the NAFTA package, including the supplemental agreement.

The document should strive to compare the environmental effects of NAFTA with the predicted environmental effects should the status quo be maintained. It should make recommendations for implementing legislation which minimizes negative environmental impacts, and it should be developed in consultation with non-governmental organizations and other experts.

Then, too, with respect to the Uruguay Round, the administration should agree to publish and distribute a similar document before Congress considers approval.

And then, third, with respect to all trade agreement negotiations, the administration should firmly commit—potentially through an Executive Order—to ensuring from the very earliest stages that agreements negotiated by this and later administrations will have a comprehensive, prospective environment assessments done before the texts are negotiated.

Thank you.

Senator BAUCUS. Thank you very much.

I would like to, just for a couple of minutes, get into the legal, Constitutional questions, and then move into the policy discussion here.

Back to the former, in trying to determine the degree to which, under the Constitution, Congress would have the power to mandate in trade agreements the preparation of an EIS—that is, whether Congress could amend NEPA to require an EIS in trade agreements—Mr. Yost, why don't you answer that first?

Mr. YOST. First, I am not sure that it is needed, because I think it is there. But if it were not there, I think Congress could.

We get back to the question which Professor Tribe discussed of the separation of powers. I think it is important to be sensitive to what is happening there.

Everybody agrees that there is a separation of powers problem. The question is: what violates it?

The CEQ NEPA regulations specifically say that NEPA does not apply to the President and to the President's immediate staff within the Executive Office of the President.

The question is: when you start reaching out to others and—you know, you can put the Corps of Engineers in the Executive Office of the President and the President sign the document, then you say, "Well, we don't have to prepare an EIS because the President is doing it."

In many nations trade ministries are agencies other than staff to the chief of head of Government.

And, second, courts have also been sensitive to this. Going back to Atchison, Topeka, & Santa Fe case in the 1970s, *NRDC* v. *Lujan* in 1991, as well as Judge Ritchie, the courts, which have been dealing with proposals by the administration to the Congress, have all declined or have not been asked to enjoin the President from doing something. They have only said affirmatively, "You've got to prepare an EIS."

Senator BAUCUS. Professor Tribe, I wonder if you could address that, too. And also, with the reference to article I's reference in the Constitution to Congress' authority to regulate not only commerce among the States, but commerce among foreign nations.

Mr. TRIBE. Mr. Chairman, there is no question that under article I Congress can deal with this subject. The question is whether, in doing so, it has violated the separation of powers. Article I authorizes nothing of that sort.

I think it is simply not acceptable to make the answer to that question turn on who the named defendant is. It is not a question of whether you are actually delivering to Bill Clinton upstairs in the White House an order telling him what to do. That's not the issue.

It is also not decisive, in my view, where in the organization chart you put it—"it," in this case, being the Office of the Trade Representative.

Senator BAUCUS. So it is irrelevant? What if Congress were to take the Office of Trade Representative out of wherever it is—that's a bit debatable—and set up an independent agency like the SEC?

Mr. TRIBE. Then, if you said that independent agency—suppose you said that proposals by the SEC which have a major environment impact must be accompanied by an EIS. I see no separation of powers problem there. But that is precisely because you would not be intruding upon a core article II function.

The point is that the President's power to propose legislative matters to Congress—and NAFTA is surely that—that power is one that is inherent in the text and structure of article II.

There is no comparison whatever between the Corps of Engineers or the Federal Highway Administration, whose functions are not part of article II.

What I am focusing on is that the President's proposal power can't be conditioned in this way. But you can make a deal with the President.

Senator BAUCUS. What if we have a separate department in the President's cabinet? Would that make a difference?

Mr. TRIBE. It depends on what the focus of the obligation is. If you say that when there is a separately funded office it must cooperate with a new Congressional Office of Environmental Affairs, and must make regular environmental reports, that's fine.

What I think crosses the line is saying that as a condition of—and the issue isn't when it is done—as a condition of proposing a measure to Congress for its approval, or as a condition of proposing a treaty to the Senate for its ratification, that you must accompany it with a particular substantive document. That violates both article I and article II. Frankly, I do not see any way around that.

Senator BAUCUS. I appreciate that. As I hear you, then you are saying that necessarily any negotiations that the President conducts are core Presidential—as with foreign countries—are core Presidential functions, and whoever he delegates those negotiations to is irrelevant because if the Congress requires the President to do something, that violates the separation of powers?

Mr. TRIBE. That's close to it.

And here I am focusing on the relationship not just between the President and foreign governments, but also between the President and this body, because when the President recommends something for your approval, that is a core function. And whether it is carried out by someone that you call staff or by someone who is part of a funded office with other responsibilities isn't critical.

If the President were shrunk down, if the Presidency, for purposes of separation of powers, equalled just William Jefferson Clinton and his immediate staff, the Constitution just wouldn't work.

Senator BAUCUS. Just hypothetical—we'll get to some policy question. What if the President were to negotiate a commercial agreement among the States? Would Congress——

Mr. TRIBE. I'm not at all clear the President has the power to negotiate a trade agreement among the States. I'd have to think about that.

Senator BAUCUS. That's my question. I'm wondering if he could.

Mr. TRIBE. I don't know. The Constitution contemplates interstate compacts and gives Congress the specific role——

Senator BAUCUS. That's what I'm getting at.

Mr. TRIBE. But it doesn't contemplate compacts between Congress and the President. That's why the fast-track procedure already has a specific provision saying that even if the President complies Congress is free to change its mind. That is, Congress doesn't commit to keeping something on the fast-track.

And in exactly the same way, although the President might be ill-advised to break a political commitment to Congress, if the President decides to submit an EIS and hopes to be put on the fast-track, then that might solve the problem.

Senator BAUCUS. What you are basically saying, then, is that the only opportunity the public has to be involved in this process is through the Congress, and where the Congress either ratifies or rejects the agreement that the President concludes?

Mr. TRIBE. Not quite, Mr. Chairman, because Congress can make its will clear. Senator Boxer talked about the House resolution. If it is clear to the White House that Congress will not be satisfied with looking two seconds before you leap, but will require that there be a more comprehensive assessment earlier, and if that is clear in the political environment then, although you can't get a court to enforce the deal——

Senator BAUCUS. That's the next question.

Mr. TRIBE. —it seems to me——

Senator BAUCUS. The question is enforcing it.

Mr. TRIBE. I think the only enforcement is political. And that's as it should be in our structure of government.

Senator BAUCUS. It is not judicial as it is under EIS?

Mr. TRIBE. In general.

Senator BAUCUS. In general?

Mr. TRIBE. That's my view.

Senator BAUCUS. Thank you.

Senator Chafee?

Ms. BELLO. Mr. Chairman, could I just offer a comment there?

Senator BAUCUS. Sure.

Ms. BELLO. I think it is important to remember, as you and Senator Chafee know well from your Finance Committee participation, that there is an ample role for public participation in trade negotiations through the procedures that are established in various trade acts.

USTR has established a host of private sector advisory committees. USTR has published Federal Register notices inviting comment from the public at large on the negotiation of the NAFTA agreement, including its environmental implications.

Senator BAUCUS. That's true. It does also environment, but I think it is fair to say that the Executive Branch's consideration of environmental issues is that environmental advisory groups, and so forth, in the last couple of years is basically as to the Congress as the Congress urged that upon the Executive Branch quite strenu-

ously. But that, I suppose, goes to Professor Tribe's point that it is a political enforcement process rather than a judicial enforcement process.

Senator Chafee?

Senator CHAFEE. Doctor Tribe, see if I follow this correctly.

What you said in your remarks was that the USTR is clearly an agency of the Presidency? It is the mouth of the Presidency? Micky Kantor can be fired by the President. And so that falls under the powers of article II, the President's.

But what about the various departments? Isn't the Federal Highway Administration under the President? He can fire the Secretary of Transportation. He can fire the Federal Highway Administrator. What's the difference?

Mr. TRIBE. I think, Senator Chafee, that it is not only the line of authority that I am focusing on; it is the function being carried out. That is, there are agency heads and department heads who, though they can be fired by the President, preside over a number of activities that are not what I would call the core article II functions, which are the functions of nominating people with the advice and consent of the Senate, proposing treaties for ratification, proposing legislation for approval.

My concept of the core is not all that spacious.

It seems to me that if you could say that the President's proposal of NAFTA, simply because it is mediated through an agency, is something that Congress can Constitutionally subject to an EIS condition, then why not the President's nomination of Ruth Bader Ginsburg instead of Bruce Babbitt? That's a Federal decision that has, at least in the view of many environmentalists, significant impact because he decided to nominate someone other than the Secretary of the Interior.

The point that I am making is that, when the President is exercising one of those core functions, regardless of the bureaucratic organization chart through which he does it, a court ought to be able to perceive that an attempt by a Federal district judge to say, "You must not and may not do that unless you prepare the following kind of impact statement," is an attempt to subtract substantively from the President's core powers.

Now, if you, as a body, decide that unless the President voluntarily takes certain steps, you are not going to be satisfied, you will vote "no" on NAFTA, or vote not to approve a certain treaty, then that's the way the political process works. But that's not the 103rd Congress binding the 104th.

What happened here is that, in the name of things done by prior Congresses, this Federal judge has said to the Office of the Trade Representative, acting as the agent of the President, "You must take certain steps in connection with NAFTA, and if you don't it will be unlawful for NAFTA to be introduced to Congress."

That limits your ability to consider NAFTA, and invades article I, in addition to limiting the ability of the President through the Trade Representative to propose NAFTA.

So my point does not depend on the place on the organizational chart that you put the Office of the Trade Representative, it depends on the function being performed.

Senator CHAFEE. Well, I think your points are well taken, although if somebody asked me this afternoon, "Please repeat what Doctor Tribe said," I'm not sure I could do it in its entirety.

But I also think that the point you made about Mr. Yost—Mr. Yost said, "Don't worry. It can all be done in 6 to 10 weeks, so what's the problem?" I think the issue is bigger than that, because these things shouldn't be judged in whether it can be done in six weeks or two weeks or three years.

For instance, in GATT—now, as I understand Ms. Fuller and others—I may be taking you out of context here, but it is my understanding you believe that GATT should be also—or was it you, Mr. Schlickeisen, that said the Uruguay Round should be subject to the same EIS?

Mr. SCHLICKEISEN. I don't recall mentioning the Uruguay Round, but trade agreements, in general, yes.

Senator BAUCUS. Did you say that, Kathryn?

Ms. FULLER. What I was saying is however the Constitutional and statutory issues are resolved, it is important to have a comprehensive body of information put together.

Number one, at the beginning of negotiations you need to begin to collect, with broad public participation, as much environmental impact information as possible. You then need to have a comprehensive package put together and submitted to the Congress well in advance of any legislative deliberations. Third, you need follow-up mechanisms to continue to gather information and monitor it.

Senator CHAFEE. Let me just ask each of you just briefly, under the Uruguay Round, I think there is something like 161 countries involved. I may have that a little high, but probably not too much.

Are we to say, if somebody comes in under the proponents of this—well, you, Ms. Fuller—for somebody to come in now, the effect of this on Switzerland is going to be so and so, and Uganda is going to be affected. That's going to be a real cottage industry you've got around this place, isn't it?

All right. Scratch Switzerland. They've gone down. Denmark.

Ms. FULLER. I fear that I didn't make myself sufficiently clear, because I would by no means suggest that any of us is in a position to quantify, even identify, all the potential impacts on the environment from trade.

What I think is necessary is an increasing recognition of the need to attempt to grapple with these issues, to get frameworks put in place so that we can undertake the best analysis possible.

It is, when you look at the NAFTA alone, at the huge number of schedules, a very daunting task to figure out what all of the implications would be right now, let along prospectively. But unless we undertake the task, doing the best job possible, within the context of the NAFTA or the GATT or any future trade agreements, then we are losing a huge opportunity to try to understand how these forces interact.

Senator CHAFEE. Well, Ms. Bello would say that this is the greenest we have ever embarked on, and there has been a lot of consideration of the environment.

My time is completed. Thank you.

Senator BAUCUS. Senator Boxer?

Senator BOXER. Thank you, Mr. Chairman.

This had better be a green treaty because if you ever saw what is happening on the border, it is a little bit different than other treaties.

Senator CHAFEE. If I can put in a plug for NAFTA, though, that is there now. That didn't come about because of NAFTA.

Senator BOXER. Yes. It certainly is there now. And, as a matter of fact, the Sierra Club is estimating it is going to cost $20 billion to clean the thing up. So, although people get very excited over Constitutional issues—and I respect and admire that—not being a lawyer—I am married to a family of lawyers, so I understand. Not being a lawyer myself, I don't get as excited as you do on these Constitutional issues, but I do understand their great importance.

I am a little confused, however, at some of the reasoning here.

Professor Tribe, Mr. Yost makes the point that EISs on international agreements are nothing new. He notes that EISs were prepared on the Panama Canal Treaty, the Montreal Protocol on Substances that Deplete the Ozone Layer, and the START Treaty.

You argue that requiring an EIS on NAFTA, as does Ms. Bellow argue, would infringe in the President's Constitutional authority.

My question is: were the EISs prepared on other international agreements unconstitutional?

Mr. TRIBE. Not at all, Senator Boxer. No court ordered that they be prepared.

I would, myself, recommend, if the President were to ask, that in many instances—in many of those you mentioned—it was wise to prepare in EIS. I believe in looking before you leap. But I don't think a Federal judge can order the President to take that look in this context.

Senator BOXER. So that, in other words, what you are saying is if the President and the Congress agree, it is not unconstitutional on its face——

Mr. TRIBE. Right.

Senator BOXER. —to undertake.

Mr. TRIBE. That's right.

Senator BOXER. Do you agree with that, Ms. Bello?

Ms. BELLO. Yes, Senator. Basically, the President has the discretion to choose to prepare an EIS, even when he is not required to do so, and even though the courts would have no proper role reviewing them and ordering them, as Professor Tribe mentioned.

Senator BOXER. As a non-lawyer I ask some very basic questions here.

It is my understanding that international trade agreements take precedence over our own environmental laws; is that correct, Doctor Tribe?

Mr. TRIBE. Yes. It is actually not a very simple question because if you were just to read the Constitution you might wonder how the President can make a mere executive agreement not approved by two-thirds of the Senate, as a treaty would have to be, a part of the supreme law of the land.

If we were writing on a clean slate, I think a credible argument could be made that some of the law in that area gives the House of Representatives too much power, subtracts unconstitutionally from the power of the Senate, where the States are represented.

I haven't carefully analyzed that, but the precedents suggest that right now, pursuant to things like the fast-track legislation, all you need is a mere majority in the House and Senate and, in fact, if the President simply negotiates an executive agreement with a foreign government and does not submit it to Congress at all for approval, a Supreme Court decision suggests that is part of the supreme law of the land and can displace the environmental laws of California.

I wonder about why that should be, but that is the law at the moment.

Senator BOXER. That's a very important point. It concerns me greatly. And so I would ask our non-Constitutional experts who are here out of their concern for the environment could answer this question.

If, in fact, we know that this treaty would take precedence over our own environmental laws, just putting the Constitutional questions aside, doesn't it stand to reason—and I guess I'm leading you in this question, but it certainly makes sense to me that we would want the toughest environmental studies to go forward so we know what we are doing.

We do have a messy situation at the border. We have had reports at the Texas border—they don't know if it is true—that there is some potential—it is possible that the children who are being born there with brain damage or without brains could be somehow associated with environmental problems with the toxics at that border.

As I said, the New River that flows from Mexico to California is the most polluted river in the western hemisphere, with all kinds of toxics and problems.

So to me it is not a matter whether a judge orders it; it is a matter of what we need to do to be sure that this treaty is going to help us, not hurt us. Would you share your views on that?

Ms. BELLO. Senator Boxer, could I offer a view?

Senator BOXER. I know your opinion on that, but I'd like Ms. Fuller to——

Ms. FULLER. One of the main concerns from the environmental community has been that the NAFTA not preempt tough U.S. Federal and State legislation. We would certainly welcome clarification through the supplemental agreements on the preemption point. But my understanding is certainly that as the NAFTA text currently exists it does respect both Federal and State environmental measures, and so it should not impair any of our hard-won, tough environmental measures.

Senator BOXER. Can we enforce that? That's my question.

Mr. SCHLICKEISEN. Yes. Kathryn and I both signed a letter that—we haven't the details in front of us now—that basically stressed that as one of the points, speaking for the seven environmental groups that sent a letter to the President on this, that it was a requirement for our support of the legislation.

I want to mention one more thing, though, because you are referring to the State and local laws.

Also in the letter that we sent was a request that part of the environmental supplemental agreement call for process standard negotiations to begin, because a lot of this debate over what happens involves what happens, for example, in the commons—which you,

Senator Boxer, especially may be aware of because of your history with the issue. The whole tuna/dolphin dispute comes from that.

The letter we sent suggested that, as part of the negotiations, the U.S. should require that within six months of the implementation of the treaty that negotiations begin on negotiating comprehensive process standards, and that until such time as the process standards are agreed to, that they agree to a moratorium for not bringing any trade dispute issues before the panel regarding wildlife conservation in the global commons.

So it is pretty strong in that regard if it finds its way into the environmental supplemental agreement.

Senator BAUCUS. Thank you, Senator.

OPENING STATEMENT OF HON. ALAN K. SIMPSON, U.S. SENATOR FROM THE STATE OF WYOMING

Senator Simpson has now joined our panel.

Welcome, Senator.

Senator SIMPSON. Mr. Chairman, I thank you.

I look at this list of witnesses, and I see many I have heard before in various forums testify, but particularly Doctor Tribe. It is good to see you again.

Mr. TRIBE. Good to see you, Senator Simpson.

Senator SIMPSON. I have a high regard for your prowess and your intellect. We don't share some things philosophically, but you know how I feel about you. You are a splendid and remarkable person, and a great resource. And I have often said—and I'm going to say it one more time—I just left another hearing just two floors away, and I thought at one unknown day you might be the person sitting at such a forum as a nominee to the Supreme Court. And I would have been there asking all those pesky questions.

I have often thought in a democracy what a remarkable thing it would be to have you and Robert Bork on the same court.

[Laughter.]

Mr. TRIBE. I think he would find that an intellectual feast, as he would say.

Senator SIMPSON. Well, both of you. I think both of you would be carnivorous in your feasting. Jurassic Park II. But I think that would have been a great thing. I really do mean that, because I know that——

Mr. TRIBE. I appreciate that, Senator.

Senator SIMPSON. And I have always said that. We need people with yeast and vitality and spirit and energy on that court, and you would have certainly fulfilled that. And after it was all over and all the energy and spirit had been expended, we would have put you on there. A lot occurred. But you know I have shared these things with you before.

Welcome.

Mr. TRIBE. Thank you.

Senator SIMPSON. Well, I was, of course, startled at the decision of the judge, assuming what I thought to be an awesome power he took unto himself—and blurring the line between divinity and tenure, I thought—that he had the awesome power to direct the

President's personal representative, the U.S. Trade Representative, to prepare and file this EIS before submitting NAFTA.

I just remain amazed how he could conclude that he has the Constitutional authority to direct the Chief Executive's personal representative to perform an act required by domestic land use law, NEPA—National Environmental Policy Act. And now we are going to delay NAFTA.

You have to be on one side or the other, we are, many of us, on NAFTA's side. I don't share the same view with my good colleague from Montana because of the issue of the side agreement. I think we both agree on NAFTA, but Max has a different view of the importance of the side agreement.

I think the thing that always gets me is that it is important for the record to note that the environmental interest groups were actively consulted all along the way here. It is not some great adventure that they suddenly woke up and tried to find a forum where they could get a decision like this—if they did. We have a lottery system that is intended to prevent that. It doesn't always work quite that way. You'll find the judge you are looking for. That's why we set up a lottery system.

But the environmental groups were always in this game. They were never left out. Their views were taken into account. Apparently that wasn't enough, and I believe there is a real misapplication of the Administrative Procedures Act and a serious violation of the doctrine of separation of powers.

But it is almost as if there was nothing unusual about a court concluding that the President of the United States of America—in this case, his personal representative—is nothing more than a simple agency.

And I think the USTR is legally not an agency of Government, at all, but rather an agent of the President, who has been delegated the power of the Executive Office and who is answerable directly to the President.

I think the appellate court will rather summarily reverse this ill-advised decision. We never contemplated that NEPA would be intended to circumvent or hinder the powers of the President of the United States to conduct treaty negotiations. That stretches every bit of common sense.

I have a question.

You stated that the USTR is an agent of the President—I wasn't here, but my staff has shared with me your testimony—and therefore, I presume not an agency of the Federal Government as related to treaty negotiations. Is that correct, Doctor?

Mr. TRIBE. Senator Simpson, I think that is correct, and I think that whether, for purposes of applying the Administrative Procedures Act, you think of this as an agency, I completely agree with everything that you have said about the separation of powers here.

It is unthinkable to me that a Federal court, speaking in the name of the 91st Congress, can tie the hands of the President of the United States in a context like this and, indeed, tie your hands—that is, tell you that you can't consider NAFTA unless something your predecessors enacted is complied with by the President through his agent, the head of that office.

It seems to me a clear violation of the separation of powers.

May I ask one more question Mr. Chairman?

Senator BAUCUS. You certainly may.

Senator SIMPSON. Thank you, Max.

Just this one, then. If, in the conduct, then, of the treaty negotiation, the USTR is not an agency, now then can a court find that the Administrative Procedures Act—can they find jurisdiction there?

Mr. TRIBE. Well, I think, Senator Simpson, given the proclivities of some of the members of the D.C. Circuit, it wouldn't shock me if this panel would say, "Well, this is an agency."

But what would dismay me—and I think surprise me a lot—is if they didn't then go on to say that, whether it is an agency or not for purposes of the Administrative Procedures Act, this fellow, the head of the Office of the Trade Representative, for purposes of introducing NAFTA, is simply acting as the extension of the President and cannot be ordered by a Federal court to prepare an EIS.

And if this panel doesn't do it, I would imagine the D.C. Circuit en banc would or the U.S. Supreme Court would.

It takes time. I'm a little surprised that they haven't sought a stay. It seems to me that this is a sufficiently egregious interference with the Executive powers of the President, and—even though I like and respect Judge Ritchie—I think that for this decision to be in force while even an expedited appeal is proceeding is wrong.

Senator SIMPSON. That's powerful. I don't know Judge Ritchie, and I made a rather cute distinction there at first about divinity and tenure, and he has an extraordinary record as an independent type of jurist, and I admire that, but I will never be able to understand how a District Court can think that they are doing this to the President of the United States and to the Congress. It is a leap of total scope with seven league boots. I think the President could send NAFTA to the Congress even if this decision were sitting right there without any addressing of any feature of it on appeal.

I don't want to ask you that question. That's just my humble thought as a lawyer from Cody, Wyoming. But I think he could.

Mr. TRIBE. I think that he would not be held in contempt if he did, but I think the Office of the White House Counsel might advise caution because, although the decree here is directed only to the OTR, the spirit of this opinion does not invite easy evasion.

Senator BAUCUS. Thank you very much.

Senator SIMPSON. Well, Doctor Tribe, thank you very much. I always enjoy hearing what you have to share with us in almost any forum. I have the greatest respect for you.

Mr. TRIBE. Thank you.

Senator BAUCUS. Thank you very much, Senator.

Senator Boxer has to leave very shortly, so I will now turn to Senator Boxer.

Senator BOXER. Thank you so much for your consideration Mr. Chairman and Members.

Mr. Yost, if you could give me a quick yes or no to this—if it is that easy—you were pivotal in drafting the regulations concerning NEPA. Do you think Congress intended to include international accords in the scope of NEPA coverage?

Mr. YOST. I really don't know the answer to that. Congress did specifically say proposals for legislation. That is very clear. And

something which comes from the Executive Branch to the Congress is supposed to have an EIS.

Senator BOXER. And NAFTA——

Mr. YOST. It does not exclude——

Senator BOXER. If I might interrupt you?

Mr. YOST. Yes.

Senator BOXER. So NAFTA is coming to the Congress for a vote; is that correct? And I don't think anyone disagrees with that—that it is coming for a vote. And so what you are saying is if that can be interpreted as legislation, you don't think it is that much of a reach to require this EIS?

Mr. YOST. That's correct.

Senator BOXER. OK.

And I want to ask my dear friend, a person I admire probably more than anyone, Doctor Tribe, to comment on this.

You believe that Congress has a right to vote on NAFTA? Is that correct?

Mr. TRIBE. Yes, Senator Boxer.

Senator BOXER. Do you believe that Congress has a right to vote on side agreements if side agreements come forward?

Mr. TRIBE. Yes.

Senator BOXER. Then why would you not believe that it is very important for Congress to have all the information it needs to make the decision?

Mr. TRIBE. I think it is important, Senator Boxer.

Senator BOXER. And why would it then be such a leap for a judge——

Mr. TRIBE. But that is the leap.

Senator BOXER. —to suggest that for Congress to exercise its Constitutional role——

Mr. TRIBE. It seems to me that——

Senator BOXER. —that it needs this information.

Mr. TRIBE. There are a lot of things that I do think judges have the power to do. Perhaps some of them are issues on which Senator Simpson and I might disagree. But I just can't figure out where a Judge gets the power to order the President, through his agent, to prepare all kinds of things as a condition of proposing either a treaty or a statute or an agreement for Congress' consideration. I don't think that power exists in the Judiciary.

And I also don't know how that judge has the power to do it to you. I stress that what Judge Ritchie did in spirit, basically—though I'm not sure who would be held in contempt if it were violated—is to say that, if the White House arranges to put NAFTA before you for a vote, you are not entitled to look at it because that's a violation of his order because there was no EIS prepared with it. I think that's just——

Senator BOXER. So what you are basically saying is that if Congress feels it needs this information Congress should just vote no on the treaty and say, "Look, we need more information on the environmental impact before we can vote." That would be——

Mr. TRIBE. It seems to me that—you know a lot more about bargaining with the President than I do, but it seems to me that before you come to that brink, if it becomes clear enough that

NAFTA is in trouble unless there is more environmental information, then it may well be forthcoming.

I also suggested earlier that you could create an Office of Environmental Assessment of your own so that when you do not think you know enough from what you are told by the Executive Branch, you are not at the mercy of that branch.

Senator BOXER. Well, let me—taking up on your point of bargaining with the President, let me turn to my two friends at the end of the table who bargained with the administration on this environmental issue so that I understand exactly what you think that you got.

You said that your support for NAFTA was contingent upon an agreement that stated that State environmental law and Federal environmental law would take precedence over NAFTA, or that NAFTA would never contradict State or Federal environmental law. How will this be enforced?

Ms. FULLER. If a State law was challenged as a trade barrier, and it was demonstrated to have a legitimate environmental purpose, then the State law would be vindicated, would continue to take precedence.

Senator BOXER. And it is your understanding that the administration has agreed to this and this will be in the side agreement?

Ms. FULLER. This is what the environmental community has urged that the administration clarify, and it is our understanding that the administration is seeking that clarification in the negotiations of the supplemental agreement.

The supplemental agreement is supposed to have the same status as NAFTA, itself, so it would become a law and, if this provision is in it, presumably we'd be able to enforce it.

I'm less optimistic that the provision that has to do with process standards in the agreement is currently being negotiated.

I'd remind you again, this has to do with the Marine Mammal Protection Act with which you are——

Senator BOXER. I'm very familiar with it, and I know exactly what happened. We were overruled. Our laws were overruled on the killing and taking of dolphin, and Mexico backed off because they didn't want to see this thing come to a head until after NAFTA, so I am very aware.

Let me ask Ms. Bello: do you think that kind of language could stand up?

Ms. BELLO. Senator Boxer, I think what is crucial is what the agreement that has already been negotiated and signed provides. It provides clearly, repeatedly, unequivocally that, for example, each party may adopt, maintain, or apply any standards-related measure, including any such measure relating to, for example, the environment, and any measure to ensure its enforcement and implementation.

It goes on. Again, this is part——

Senator BOXER. I'd just ask you specifically do you believe that the case that Ms. Fuller explained, where we would have a tougher law—one of our States, say California, has a law against a certain pesticide, and it is coming in from Mexico?

Ms. BELLO. There is no conflict because the agreement, itself preserves U.S. sovereignty. It preserves the right of federal, State and

local governments to establish our own environmental standards at whatever levels of protection we think are appropriate. There is simply no conflict. It is not a question of——

Senator BOXER. OK. So it is your opinion that our environmental law prevails, unlike the GATT problem, we would never be faced with a problem where our environment can be jeopardized, that our laws would prevail over their laws?

Ms. BELLO. That's correct. Articles 904 and 905 completely address this situation. I believe it should be to your satisfaction in that regard.

Senator BOXER. And that's in the treaty, itself, not a side agreement?

Ms. BELLO. It is in the agreement that has already been negotiated and signed. It is articles 904 and 905.

Senator BAUCUS. Thank you.

Senator BOXER. Thank you very much.

Senator BAUCUS. Frankly, what Ms. Bello says is essentially true—that is, the agreement does contemplate that States and local governments can have higher environmental standards than Federal standards and enforce them with respect to trade, say with Canada or Mexico, so long as they don't discriminate—that is, those standards don't discriminate against foreign products compared with the American products.

Senator BOXER. That's a major loophole.

Mr. TRIBE. May I express a worry about that, Senator? I just want to insert a footnote of a little worry.

I do see that 9041 sounds like that, but I have seen laws that looked like that before and I have seen what courts have done with them.

Look at 9042. It says, "Notwithstanding any other provision of this chapter, each party may, in pursuing its legitimate objectives of safety or the protection of human, animal, or plant life, take certain steps."

It would not be beyond imagination from my point of view to have a trade group or some other group of citizens come in and say, "This is really a trade barrier masquerading as a higher environmental standard."

I don't know how, precisely, a side agreement would be worded to eliminate or reduce that possibility, but lawyers are quite ingenious at creating ambiguities even when there is less basis than there is here.

Senator BAUCUS. I appreciate that. Yes. Perhaps I can clarify it. It is my understanding the intent, though, is to do what Ms. Bello and Senator Boxer discussed.

Senator BOXER. Thank you, Mr. Chairman, for your patience.

Senator BAUCUS. Thank you.

A question I have is, with respect to environmental matters in trade agreements, whether the political process in enforcing environmental consideration is sufficient.

I say that because in the past—that is, pre-1969—there are many who argued that the political process was sufficient with respect to actions that Federal agencies might take in domestic law—that is, with the BLM, the Forest Service, Corps of Engineers, or what not.

And because this Congress believed that the political process was insufficient, and therefore presumably a majority of the American people felt that the political process was insufficient, Congress enacted the National Environmental Policy Act, under which an agency that takes a major Federal action must conduct an EIS and, as we know, if the EIS is insufficient, courts will enjoin agencies from taking that Federal action.

A major case that comes to mind is Judge Dwyer's ruling in the Pacific Northwest that the BLM did not take conduct a sufficient EIS with respect to the spotted owl—salmon, or other potentially endangered species, too.

The main point is that there is an enforcement—Congress felt that the political process was insufficient, that there had to be some way to institutionalize environmental considerations a little bit more strongly, and, therefore, enacted the National Environmental Policy Act with requirement of EISs and so forth so the public can have an opportunity to stop and think and at least be aware of theoretically environmental considerations.

As we know, NEPA also requires the EIS to look at alternatives of actions, too. It doesn't mandate that the agency undertake those actions; it just requires that the information be available so that then the political process can work its will.

If your conclusion with respect to separation of powers and the core functions of the Presidency prevail, then we face the question of how we bolster the political process with respect to environmental considerations in trade agreements.

I'd like any of you to take a shot at that.

Mr. Tribe?

Mr. TRIBE. I have an idea, but it is not really mine, in particular.

In preparing for this hearing, I tried to look at what a lot of people have written about the fast-track procedure, and I think one of the most thoughtful articles I have come across is one by a Law Professor named Harold Koh of Yale. It is in Volume 18 of the Brooklyn International Law Journal of last year.

He analyzes a number of arguments about how the fast-track process, itself, might be staged or rearranged.

I don't necessarily commend any of the particular conclusions he reaches, but it seems to me, just as that process right now, for example, says that if the President wants to put a trade agreement on the fast-track, a trade agreement, the proposal that is made to Congress must be accompanied by a statement that describes the progress made in achieving section 1102's negotiating objectives, so Congress could specify, along the model of the EIS or some other kind of environmental impact requirement, that, as a condition of getting on the fast-track the following environmental studies must be conducted. It seems to me, although that couldn't be enforced by a court, and although the Congress itself—a future Congress—would not be bound, that hasn't prevented the existing fast-track procedure, which is subject to unilateral change by Congress, from changing the environment of public participation.

As Senator Simpson says, I think environmental groups did have a very considerable input. One can debate whether it was too much or too little, but they had a lot more input than they would had the

trade legislation that set up the fast-track not changed the bargaining dynamic.

It seems to me that, as a practical matter, that kind of provision, even though not judicially enforceable, and even though it is simply part of Congress' internal guidelines, might make a lot of sense. It would be a way of institutionalizing what otherwise would be an informal negotiation with the Office of the President.

Senator BAUCUS. So you are essentially saying that Congress can prescribe different actions and set up different agencies or Government entities or create them, or what not, to get as much environmental information as possible and also, as a Congress, ultimately can either reject or ratify whatever agreement the President might submit to the Congress.

Mr. TRIBE. And, even more than that, you could say—I mean, the fast-track gives the White House lots of advantages. The thing has to be voted up or down. There is limited time for debate, and so on.

If Congress were to say, "You don't get on the fast-track, Mr. President, unless you give us the following information," it seems to me that, though you can't enforce that, that can be——

Senator BAUCUS. That's right.

Mr. TRIBE. —institutionalized every bit as much as the existing fast-track procedures.

Senator BAUCUS. But the point is that could not be enforced in the courts.

Mr. TRIBE. Nor can the existing fast-track procedure. At least I think it cannot be.

Senator BAUCUS. Mr. Yost?

Mr. YOST. To add a bit to that, right now we have been concentrating on NAFTA because of the time bind and the court decision and so on, and I think everybody is a little unhappy with the kind of bind we find ourselves in right now. But, looking ahead to GATT, the conclusion of the Uruguay Round, presumed next Green Round on that, what can we do to do things better then?

I certainly agree with the substances of what Kathryn Fuller was saying of the kind of ongoing analyses that you need.

I understand that Russ Train was here last week testifying on sustainable development, but got asked a question on this, and he, for whom I have the most extraordinary regard, said he didn't think it could be done under NEPA, but this kind of process in which there are environmental assessments tiered to later assessments as it goes through the process, the public has input, the previously closed negotiations on trade be open to the public and environmental considerations in some way—I think that's really the way to go and for you all to create coherent mechanisms for that to happen.

I personally feel that can be done under existing law, that direction can be given that there be EIS or EIA and then it be tiered to a later one at a later stage in the process. But it certainly also could be put into specific statutory form, including in the way that Larry Tribe is suggesting.

Senator BAUCUS. Thank you.

Senator Chafee?

Senator CHAFEE. Gentlemen and ladies, it seems to me that what we are discussing here is not just thrashing over Judge Ritchie's

decision, but what's the procedure for the future in connection with trade agreements as far as environmental concerns.

It seems to me, if I have understood this correctly, that what Doctor Tribe is suggesting is that this is a political decision, that the court should stay out of it, and Congress has political ways of making its views known.

For example, we have is a whole list of what happened under environmental considerations under President Bush.

May, 1991, congressional concerns about NAFTA prompt a joint letter from Chairman Bentsen and Chairman Rostenkowski to the President. They want information about the environment and health and safety standards and worker rights. The President transmits an action plan back.

And so it seems to me that the Congress has an opportunity to get into this act at several stages—certainly the fast-track vote. No, we won't vote for that if you don't give us more information on the environment.

Isn't that enough? What more—I'm very nervous about putting in a specific method of dealing with all trade agreements on the environmental matters. It is a different thing between dealing with Mexico and dealing with 161 nations on GATT.

Am I all wet on this, Ms. Fuller?

Ms. FULLER. I think——

Senator CHAFEE. Respond gently now if I am.

Ms. FULLER. I would never say that you were all wet, Senator Chafee.

Senator CHAFEE. Use your own words.

Ms. FULLER. Whether statutorily mandated or voluntarily, it is important, in the context of all trade negotiations, to collect the best information possible.

There are a lot of different political methods of doing that. We have been talking about some of them. And there are some institutional mechanisms that have been discussed as well this morning for attempting to ensure the most comprehensive information possible.

We do need—in the context of the North American Free Trade Agreement—the North American Commission on the Environment to provide for ongoing monitoring and efforts to ensure that when we do identify environmental impacts we are able to address them in some fashion.

Senator CHAFEE. But can't we do that? After all, Chairman Baucus has said, "I'm not going to vote for this thing if it doesn't do such and such in the environment." So he doesn't have to vote for it. And if enough people agree with that view, that group can get together and say, "I don't care what the Constitution says, or Judge Ritchie says, if you are going to get this agreement, Mr. President, you have got to have an EIS."

Isn't that your point, Doctor Tribe?

Mr. TRIBE. Very strongly, Senator. And I think that what you are on to seems to me to be a much larger piece of wisdom, and that is: institutional gimmicks can get you only so far.

It seems to me that people want to set up elaborate institutional machinery when they are worried about the substance of some problem, whether it is environmental degradation or something

else, and it seems to me that you sort of feel good, having set up an elaborate statutory structure, but it is not necessarily going to do very much, especially if I am right about it not being judicially enforceable.

Whereas sort of grabbing the bull by the horns and saying, "Look, we are just not going to do A unless you do B," seems to me may take a different kind of political courage.

It may not look as elaborate. You may not be able to say, "Look at this enormous edifice we have created." But that may be the way to get things done.

Senator CHAFEE. What do you think, Ms. Bello?

Ms. BELLO. Senator Chafee, I couldn't agree with you more. I think this is the responsibility and power of the political branches of Government—the Legislature and the Executive.

I think that the reason that NAFTA is the greenest agreement is because the Congress and the public, including environmental groups, made it clear that those issues would be taken heavily into account when the Congress ultimately votes whether to accept or reject NAFTA in voting on the implementing bill.

But both you and Senator Boxer made a very important point. Both of you suggested that NAFTA may be an extraordinary agreement, with much greater interest on environmental issues than many other more garden-variety trade agreements.

So my concern about what Dr. Tribe has called "institutional gimmicks" is that they can be inflexible. And what you might want to have done for NAFTA might be wholly inappropriate and unnecessary, and an inefficient allocation of scarce governmental resources, for some micro, bilateral, sectoral trade agreement.

I think it is a political process.

Senator CHAFEE. I agree with that, and it is interesting. I find witnesses' testimony excellent when I agree with it. You have given very good testimony.

Ms. BELLO. Thank you, Senator.

Senator CHAFEE. But I will say this. An interesting point—I have been informed, because I have been brooding over this—and I'll make it very quick. Apparently, under current Administration policy, NEPA does not apply to overseas actions of the U.S.; i.e., if the U.S., through AID money, gives India some money to build a big dam, apparently NEPA doesn't apply.

It would seem that would be a much clearer cut case than having it apply to a trade agreement. It seems to me shipping money overseas to the Philippines to bulldoze down some rain forest under an AID program of the U.S. would clearly require NEPA action. But apparently it doesn't.

My time is up.

Senator BAUCUS. I see Mr. Yost waving his hand.

Mr. YOST. I might say I agree with what you have just said, Senator Chafee, but——

Senator CHAFEE. It is not a question of whether you agree with the policy. The facts are—as my understanding—the facts are—and this is being contested currently—but so far—after all, we have been involved with AID for about 35 years, and NEPA for 20 years, and it doesn't so far.

Mr. YOST. But returning to your earlier question, if I might, in which there was a preference shown by you and by Doctor Tribe for political resolution, clearly if everybody is on the same wavelength—everybody on the Hill and in the Executive Branch, the public—thinks the environmental impacts of trade are a concern and we are going to address it, there is no problem. It is going to get taken care of it.

It is when somebody isn't on board and declines to look at such impacts, that's a problem.

While Doctor Tribe was reluctant to have what were termed "institutional gimmicks" that can be inflexible, I think you hit the nail on the head, Mr. Chairman, in referring back to 1969 and the enactment of NEPA. Sometimes we need laws which are of universal application to deal with major problems.

Senator BAUCUS. Thank you very much.

Senator Simpson?

Senator SIMPSON. I'm glad I wandered in here. I've got to go back in just a moment to my labor.

Anyone can answer this. What do we do when we reject the treaty, if we do? I hope we don't. I'm very much in favor of it. So what happens then to the United States of America when we reject the treaty if we do that? What have you solved? Because what I hear—and I was at a forum last week where we discussed some of this—I detect a note of paternalism about Mexico that is repugnant to me. Mexico is not a Third World power. Mexico is a stirring, vibrant democracy with a tremendously progressive president who has put himself right down on the line, as has the President of the United States. And he will do that, I think—President Clinton—with much more vigor when some of these things pass off the screen.

So here we have a situation where we could do something with environmental problems. With no treaty, what input and participation are you going to have, please? Will you please tell me what you solve when you don't have a treaty and then you just let the sewer run?

I have heard all the stuff that can happen. Let this occur. Let this occur. Let immigration continue unabated when the treaty could hold people there. I hear the same people often mumbling into the vapors, "If they only had a stable economy down there then they wouldn't have this tremendous loss of people."

Here is a chance to address the environment. Here is a chance to address labor. Here is a chance to address immigration. And the only way to do that, as I see it, is to enter into agreements and treaties with that country, just like we do with Canada, to help ameliorate those problems.

So tell me what do you solve—whether you do it with gimmickry or technique or trivia or judicial over-glandular activism? What do you solve? What is out there?

Ms. FULLER. Senator Simpson, I would like to start just by saying that everybody at this table is a strong supporter of NAFTA and of the side agreements which President Clinton pledged to negotiate.

The environmental community has played as strong and influential role as possible ensuring that NAFTA is as it has been called, the greenest trade agreement yet, and to work with this Adminis-

tration, with the Mexican administration, and the Canadians to ensure that the supplemental agreements are also strong.

The reason that many of us in the environmental community came together to come up with a set of proposals was because we do see enormous benefits to our economy and to our North American environment that can flow from the NAFTA.

So it has been our premise from the beginning to work toward completion of a successful NAFTA and supplemental agreements.

Senator SIMPSON. But when we have thoughtful legislators like Senator Max Baucus who say, "I'm for NAFTA, but if these agreements are not there I will not be," that's reality. That's where we are. That's the box we are in.

Mr. SCHLICKEISEN. I'll just add a couple of points, Senator, to what Kathryn said.

I think, without trying to be patronizing to Mexico, because I think we share a great deal of respect for what President Salinas is doing down there—I saw a little of it firsthand myself, and I do think he is on the right track—there is a difference, though, and I think the chairman pointed it out a year and a half or so ago, and I think it was the "Washington Post"—one difference is that this would be the first trade agreement between a developed and a developing nation, and the environmental issues get raised many fold just because of that reason alone.

There are many more opportunities here for environmental damage if there isn't good enforcement of laws. Mexico has promised good enforcement of its laws, but a certain amount of political pressure can help President Salinas, I think, indeed enforce a lot of those laws, and certainly a certain amount of funding that comes out of the agreement could help repair some of the damage that has been done, and that's the position we have been taking on it.

It's not that we are trying to be patronizing, but we are trying to recognize that this is different. This is not the same as Canada and the United States, where they basically have the same approach to environmental protection. It is a developing country—a good one, moving forward quickly, and puts a lot of faith in environmental protection. But they do need some help, and I think the agreement needs some extra recognition of that, and that's why it should be the greenest trade agreement that we've had.

Mr. TRIBE. If I could just speak briefly to that—not with any supposed expertise, but just as a citizen—I do have a very, very great worry here that the best becomes the enemy of the good.

I hear Senator Boxer—and I'm sorry she had to leave—I hear her talking about all the environmental problems on the border. Of course they weren't caused by NAFTA, but they are there now. I understand, and I very much admire, Kathryn Fuller's work for the Wildlife Fund, and I admire what is being done. This is an opportunity to make environmental progress.

But if, in the search for that opportunity, a number of lawmakers are put in the position where they end up voting against the whole thing because it isn't perfect, because the side agreements aren't all they might be, that's not going to improve the environment.

I am, frankly, worried that in the pursuit of environmental utopia we are going to end up with a worse situation for North America.

Senator BAUCUS. Thank you all. Thank you, Senator Simpson.

This last discussion really points out the basic core of the problem that we are now facing—that is, convergence of trade environment matters. They are getting more and more inter-twined with each passing day. With advances in technology and capital travels at the speed of light, essentially—it doesn't respect national boundaries—it is a global economy that we now have. And it is true that the environmental problems that we have, particularly along the boarder, were not caused by NAFTA.

There is no doubt about that. But it is also true, as Mr. Schlickeisen pointed out, that differences between the United States and Mexico are much greater than they were between the United States and Canada. Our population is about 250 million. Mexico is about 85 to 90 million. The median age in Mexico is about—I have heard between 15 and 18. In the U.S. it is 33. The average wage rate in Mexico is about one-seventh that of the U.S. The average per capita income in Mexico is one-seventh of the U.S.

There is a big gulf between the two countries. Even though Mexico has adopted, for all intents and purposes, American environmental law—in 1988 they have this all-encompassing environmental law which is very similar to a collection of American environmental statutes—on the other hand it is clear that they are not enforced.

It is a one-party country. The pre does control. It is a parliamentary form of government. That all—the culture—there are all kinds of reasons why the environmental laws are not enforced.

So there is an opportunity here, with the convergence of trade and the environment, to try to right the best—I'm not saying it should be the enemy of the good, but the best possible—language on trade and environment, because it, to some degree, will be a precedent for future trade agreements, whether it is the Uruguay Round or North American Free Trade Agreements extended all the way down to the tip of South America. Who knows? And maybe even with Southeast Asia or Japan. Who knows?

But, at the very least, we should do our very best to understand this convergence, because the ultimate goal, really, in my judgment, is sustainable development. We have to work hard to improve our living standards. We have to be sure that it is all sustainable. That means equal attention to not only our Nation, but to the world environment.

That's basically what we are getting at here—sustainable development as we try to get the right resolution of trade and environmental issues.

Senator CHAFEE. Mr. Chairman, I notice that the lights are on for a vote, but I would just like to say I noticed in Mr. Yost's statement he talks about "trade which benefits both developed and developing nations raises economic standards in ways which can enable greater attention to the environment. A rising tide lifts all boats."

I certainly believe very, very strongly that the best thing we can do for the environment, improving the environment in Mexico, is to make Mexico a more prosperous nation.

I feel very strongly in favor of the NAFTA agreement. I know how generally you feel, Mr. Chairman. Nobody can challenge your environmental credentials. But there are others out there who are using the environment as a nice, convenient tool to oppose the agreement that they are not for anyway.

Senator BAUCUS. There are some. That's right. I'm not in that camp.

Senator CHAFEE. I know you are not in that camp.

Senator BAUCUS. The hearing is adjourned.

[Whereupon, at 11:32 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

[Statements submitted for the record follow:]

Testimony of

NICHOLAS C. YOST

on

NEPA AND TRADE AGREEMENTS

before

The United States Senate Committee
on Environment and Public Works

July 22, 1993

Thank you, Mr. Chairman and members of the Committee for inviting me to testify today on the subject of the National

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NICHOLAS C. YOST is a partner in the law firm of Dickstein, Shapiro & Morin in Washington, D.C. He served as General Counsel of the Council on Environmental Quality in the Carter Administration, where he was responsible for drafting the CEQ NEPA Regulations which remain in effect and which bind all Federal agencies. He also served as Director of the President's Task Force on Global Resources and the Environment. He had earlier served as Deputy Attorney General in Charge of the Environmental Unit of the California Justice Department and as counsel to California's Environmental Quality Study Council. He has also served as a public interest lawyer, as a visiting scholar at the Environmental Law Institute, as Chair of the American Bar Association's Standing Committee on Environmental Law, as well as Chair of the California State Bar and District of Columbia Bar counterparts. He is currently a member of the National Conference of Lawyers and Scientists and was a speaker at the North American Conference on Environmental Law and Policy in Mexico City (1992) and a member of the U.S. Delegation at the United Nations Conference on Environment and Development in Rio de Janiero (1992). The views expressed in his testimony are his own.

Environmental Policy Act (NEPA) and trade agreements. It is always a pleasure to be back before this committee with its distinguished tradition of bipartisan, enlightened attention to the Nation's environmental concerns. I gather that your invitation was occasioned in part by my having been responsible for the Federal Government's regulations implementing NEPA while I was General Counsel of the Council on Environmental Quality in the Carter Administration (40 C.F.R. Parts 1500-1508[1]). By way of further disclosure of where I am coming from, I am an environmentalist, I am a supporter of NAFTA, and I agree with the Administration's policy of seeking NAFTA approval coupled with certain environmental and other side agreements. As you will see, I believe it possible to have both NEPA compliance and timely Congressional action on NAFTA.

Before getting into the substance of my testimony, let me make three preliminary observations:

First, NEPA is a law which originated in the Congress. The Environmental Impact Statement requirement was created by the

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[1] The Supreme Court has described the CEQ NEPA Regulations as "mandatory regulations applicable to all Federal agencies." Andrus v. Sierra Club, 442 U.S. 347, 358 (1979). They are entitled, said the Court, to "substantial deference." (Id.) The CEQ NEPA Regulations are widely supported. (See attached letters on behalf of the U.S. Chamber of Commerce, the National Governors' Association, N.R.D.C., and the National Wildlife Federation.)

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Senate -- specifically by the late Henry Jackson and his staff and advisers. John Dingell carried the bill in the House. Congress imposed NEPA upon an unwilling Executive Branch. That branch has traditionally been less than enthusiastic about NEPA -- and for understandable reasons, since it is the Executive Branch which Congress regulated by enacting NEPA, forcing officials to consider and make public the environmental impacts of their actions.

Second, let me emphasize the wisdom of Congress in imposing NEPA upon the Executive. What is it that NEPA does? It merely says that the Executive Branch must look before it leaps environmentally. It must anticipate environmental impacts before they occur -- and hopefully take care to avoid or minimize them -- as distinct from waiting until environmental contamination or degradation occurs and then having to clean it up or otherwise repair it. NEPA is America's preventive environmental law -- requiring only that you look at the environmental consequences before acting. That, quite simply, is good government.

Third, let me suggest that international trade and environmental protection impinge upon each other in many ways, some complementary and some adverse:

- Trade which benefits both developed and developing nations raises

economic standards in ways which can enable greater attention to the environment. A rising tide lifts all boats.

- Trade in environmental technology and in other environment-friendly products presents opportunities for all.

- Sustainable development, to which the United States committed itself at the Earth Summit in Rio, implies making available increased financial resources for development and for environmental protection. At a time when massive foreign aid is not in the offing, the transfer of funds in exchange for natural resources through trade furthers the end of sustainable development.

- The very process of negotiation between an environmentally experienced developed nation and a developing nation which has devoted fewer resources to environmental protection can result in the latter's coming to place greater emphasis on environmental protection.

- What one (usually developed) nation or its political subdivision sees as an environmentally protective law may be seen by another (usually developing) nation as a non-tariff trade barrier subject to invalidation.

- Insofar as one (usually developing) nation's competitive advantage in trade is premised on lower costs including lower expenditures for environmental protection, there is

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> both an impetus to keep such expenditures low in that nation and a similar incentive in other (usually developed) nations to lessen that advantage by lowering environmental expenditures themselves.

Now on to the substance. What does NEPA require? In the statute's words it requires an Environmental Impact Statement (EIS) on "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, . . ." (NEPA, §102(2)(C). Emphasis added.) I would think the language of the Congressional enactment particularly clear. If the Executive Branch proposes "legislation" or takes any "other major . . . action" which may significantly affect the quality of the human environment, an EIS is to be prepared. I would have thought the process by which the Executive proposes NAFTA or other trade agreements to Congress for approval a "proposal for legislation." If not, it certainly is caught up in the catch-all phrase of "other major Federal actions."

May a trade agreement such as NAFTA have a significant environmental impact? (40 C.F.R. §1508.3.) I would think, given the debate on the subject, that it is fairly evident there may be such an impact. If so, an EIS must be prepared. In short, under NEPA a trade agreement presented by the Executive Branch to

Congress for approval requires an EIS. The United States District Court's recent decision in the Public Citizen case was a sound one. I agree with the Chairman of this Committee when he said to the Center for National Policy that there was a "very good basis for the judge's decision" (July 1, 1993) and with the Chairman of the House Committee with jurisdiction over NEPA, Congressman Studds, that this was "absolutely the right decision" (press release, July 1, 1993).

Having asserted a bottom line of what the Congressional enactment requires, let me back up and go into detail. Particularly let me concentrate on what should be done now. In short, I believe it is possible to have our cake and eat it too -- to prepare an EIS which will be helpful to you in the Congress and to the public in a time frame compatible with the President's intentions for approval of NAFTA this year.

Let me elaborate:

- First, EISs on international agreements are nothing new. Environmental impact statements have been prepared on at least a dozen treaties and agreements including the Panama Canal Treaty, the Montreal Protocol on Substances that Deplete the Ozone Layer, and the START treaty. By way of further elaboration, the Department of State prepared EISs on treaties or conventions in the Nixon, Ford,

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Carter, and Reagan Administrations. DOD did so for START in the Bush Administration. To repeat -- EISs on international agreements with significant environmental impacts are nothing new. What I find extraordinary is why, given the environmental debate surrounding NAFTA, no EIS was prepared on it a year ago.

- Second, I understand that both our cosigners of NAFTA, Canada and Mexico, have prepared Environmental Impact Assessments on NAFTA. (The former is a public document. The latter is not.)

- Third, the CEQ NEPA Regulations specifically provide "Proposals for legislation include requests for ratification of treaties." 40 C.F.R. §1508.17. It is worth observing that when this section was adopted, neither the Departments of State nor of Justice or the USTR made any comment on the provision despite overall close scrutiny of the regulations.

- Fourth, for legislative proposals the Regulations create a modified and accelerated procedure for EISs designed to mesh with the legislative calendar. (40 C.F.R. §§1506.8, 1508.17. Copies appended.))

  -- A legislative EIS is to be "integrated with the legislative process of Congress." (40 C.F.R. §1506.8(a).)

  -- It may omit the usual "scoping" process. (40 C.F.R. §1506.8(b).)

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-- It may omit the usual draft and final EISs. Only one EIS is prepared, and it is forwarded to Congress. (40 C.F.R. §1506.8(a).)

-- This EIS may follow the transmittal to Congress of the legislative proposal by up to 30 days. (Id.)

In short, the legislative EIS process is one designed for exactly the process which we now confront. It is flexible and expeditious.

- Fifth, given all the work that has been done -- although not coherently assembled for Congress and the public -- with respect to the environmental implications of NAFTA, it is my opinion that a legislative EIS which is thorough and useful to the Congress and to the public, which will coherently inform the public debate on NAFTA's environmental implications, can be prepared in six to ten weeks. I understand from those within the government that they too feel they can prepare an EIS within a time frame consistent with the President's seeking approval of NAFTA this year. USTR with the assistance of EPA earlier prepared a 236 page analysis of NAFTA entitled Review of U.S.-Mexico Environmental Issues, which, while not as comprehensive as an EIS, provides much of the information for one.[2]

  -- As is always the case the agency with major responsibility, the U.S. Trade

[2] EPA has also prepared its Environmental Plan for the Mexican-U.S. Border Areas (1992). Its Office of General Counsel has prepared its Evaluation of Mexico's Environmental Laws and Regulations (1991).

Representative (USTR), would be the lead agency. (40 C.F.R. §1501.5.)

-- The necessary environmental expertise can be assembled by designating EPA a cooperating agency. (40 C.F.R. §1501.6.)

-- If necessary, the lead agency may arrange for portions of the EIS to be classified and not publicly available. (40 C.F.R. §1507.3(c).)

- By way of comparison I understand that the Montreal Protocol EIS was prepared in three to four months starting from scratch -- without the earlier studies that EPA has already undertaken on NAFTA which give a leg up on the NEPA process.

- In short, I believe that -- if work is begun now -- the Government could prepare a credible and useful EIS that will enlighten Congress and the public on the environmental impacts of NAFTA. An EIS could be prepared and submitted to Congress by sometime between September 1 and October 1. The NAFTA proposal itself could have been submitted 30 days earlier, which is to say some time between August 1 and September 1. That is adequate time to allow NAFTA to come into effect as planned on January 1, 1994, should the Congress give its approval.

- What sort of environmental impacts might profitably be discussed in an EIS? Restricting impacts to those felt within the United States, I would suggest at least three:

  -- Environmental attributes of goods imported into the U.S., such as the

question whether imported fruits may carry unacceptable pesticide residues and, if so, what is to be done about it.

-- Direct cross border impacts such as air pollution and contamination of aquifers adjacent to borders.

-- Impacts on U.S. laws enacted for environmental protection -- whether Federal, State or local -- which can be perceived as subject to invalidation as non-tariff barriers to trade.

- What will be the effect of such an EIS?

  -- First, I think it will inform debate and address legitimate environmental concerns.

  -- Second, I agree with the Chairman's observation at the end of his speech to the Center for National Policy on July 1 that the District Judge may have in an unwitting way helped the passage of NAFTA by strengthening its environmental components.

- Next, let me turn to some of the objections to EISs on trade agreements.

  -- First, the objection is made that the resulting EIS can be challenged and the process enjoined and delayed. Injunctions are granted, however, only for violations of the law. Typically the number of NEPA injunctions in a whole year can be counted on the fingers of one hand. I would assume that with high visibility an excellent job will be done on this EIS, "bulletproofing" it from successful attack.

  -- Second, there is the separation of powers question. The CEQ NEPA Regulations

recognize this and explicitly provide that NEPA does not apply to "the President, including the performance of staff functions for the President in his Executive Offices." (40 C.F.R. §1508.12.) The Presidential exclusion was deliberately kept narrow extending only beyond the person to "staff functions" to ensure that the Executive Branch did not bypass the Congress' enactment by simply having the President send to Congress what others have borne the laboring oar in negotiating or formulating. Were the exclusion not kept narrow the Corps of Engineers could funnel each new dam through the President and the Federal Highway Administration each new Interstate. The exclusion was deliberately not extended to all activities within the Executive Office of the President (EOP). That would be too broad and would focus on the organization chart rather than the real world of environmental impact. If a trade agreement was negotiated by the State Department, an EIS would presumably have been prepared. Should placement of USTR in the EOP really be determinative? In most countries trade ministries are separate agencies, like Japan's MITI, rather than staff to the head of government. An organization like USTR, with a permanent staff of over 150 and an additional temporary staff of almost 100, is not mere staff to the President.

-- Finally, the observation is made that a trade agreement EIS will necessarily be general, since specific applications are not yet presented. I think that is true and is also how it should be. EISs are generally required for what are termed the "four Ps" -- policy, plans, programs, and projects. (40 C.F.R. §1508.18(b).) While most attention is paid to project EISs rank as for new dams, the more general EISs often discuss more profound

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impacts as would be the case with an EIS on NAFTA. At this stage a level of generality is thoroughly appropriate.

- Finally, let me look beyond NAFTA and the time bind -- tight but not unmanageable -- that we have got ourselves into. Is this the ideal way to apply NEPA to a trade agreement?

  -- Of course not. While an EIS summarizing environmental impacts will help focus environmental discussion for both the Congress and the public, the analysis of the completed NAFTA agreement fulfills NEPA's purposes less comprehensively than would a more carefully thought-out NEPA process which began earlier. I would suggest an early environmental analysis, including the opportunity for public input, before the U.S. negotiating position is solidified, followed by "tiering" (40 C.F.R. §§1502.20, 1508.28) to subsequent analysis (whether Environmental Assessments or EISs) as the process develops. In that way the U.S. position would be at once more environmentally attuned and open to the public. I realize that some negotiators are unused to and resistant to such ongoing public scrutiny, but as worldwide trade becomes more and more critical to all of our daily lives -- today NAFTA, tomorrow GATT -- mechanisms for building in environmental sensitivity become all the more important.[3] NEPA, an American innovation -- an innovation of the United States Congress -- has much to contribute to this process. NEPA has now, according to a State Department's survey, become the model for environmental impact assessment laws in some 84 countries, which I believe makes it the most

[3] See: OECD, Trade and Environment (OCDE/GE (93) 99, Jan., 1993).

imitated law in U.S. history. NEPA represents an accomplishment of which the Congress may rightfully be proud.

As we move toward a more sustainable future -- in which trade will play a significant part -- NEPA can help guide the way and ensure that environmental sensitivity accompanies expanded trade.

Thank you for the opportunity to appear before you today. I would welcome any questions.

NEPA, §102(2)(C)
42 U.S.C. §4332(2)(C)

SEC. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(C) Include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) The environmental impact of the proposed action,

(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) Alternatives to the proposed action,

(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

CEQ NEPA REGULATIONS,
40 C.F.R. §§1506.8, 1508.17

§ 1508.17 Legislation.

"Legislation" includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1506.8 Proposals for legislation.

(a) The NEPA process for proposals for legislation (§ 1508.17) significantly affecting the quality of the human environment shall be integrated with the legislative process of the Congress. A legislative environmental impact statement is the detailed statement required by law to be included in a recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement which can serve as the basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

(b) Preparation of a legislative environmental impact statement shall conform to the requirements of these regulations except as follows:

(1) There need not be a scoping process.

(2) The legislative statement shall be prepared in the same manner as a draft statement, but shall be considered the "detailed statement" required by statute; *Provided*, That when any of the following conditions exist both the draft and final environmental impact statement on the legislative proposal shall be prepared and circulated as provided by §§ 1503.1 and 1506.10.

(i) A Congressional Committee with jurisdiction over the proposal has a rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 et seq.) and the Wilderness Act (16 U.S.C. 1131 et seq.)).

(iii) Legislative approval is sought for Federal or federally assisted construction or other projects which the agency recommends be located at specific geographic locations. For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

(c) Comments on the legislative statement shall be given to the lead agency which shall forward them along with its own responses to the Congressional committees with jurisdiction.

Chamber of Commerce of the United States

[illegible] STREET, N.W.
[illegible], D.C. 20062

January 8, 1979

[illegible]. Nicholas Yost, Esquire
[illegible]eneral Counsel
Council on Environmental Quality
722 Jackson Place, N.W.
[illegible]shington, D.C. 20006

[illegible]ear Nick:

On behalf of the National Chamber and its 80,000 members, I [illegible]ant to congratulate you and the members of the Council on the excellent [illegible]ork done on the preparation of the November 29, 1978 final EIS regula-[illegible]ions.

These regulations are a significant improvement on prior EIS [illegible]idelines. (Significant being defined over unlike the definition contained [illegible] the new regulations in Section 1508.27).

Industry is eagerly anticipating the implementation process and [illegible] extremely hopeful that the process will be carried out in the spirit - [illegible] well as the letter - intended by the Council. I know that you and your [illegible]he staff will help on ensure that this happens.

Best wishes. We appreciate and value the open and trusting [illegible]rking relationship we have developed in the formulation of this important [illegible]asure. We hope it will continue in the years ahead.

Sincerely,

Gary D. Knight
Director, Environment and Land Policy

National Wildlife Federation

[illegible], N.W., WASHINGTON, D.C. 20036

January 17, 1979

The Honorable Charles T. Warren
Chairman
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, D.C. 20006

Dear Mr. Chairman:

The National Wildlife Federation, the nation's largest citizens conservation organization, would like to compliment you and your staff on the development of reasonable regulations for the National Environmental Policy Act which should go a long way toward reducing paper work and promoting more understandable public decisions from public officials.

We know from long experience with NEPA that this was not an easy job. Faced with NEPA's requirements for full disclosure to the public and to decisionmakers of the impacts of a project and its alternatives, agencies too often hide these vital factors in unwieldy impact statements. Your regulations cut the wheat from the chaff. They put the alternatives up front for all to see. And they key the discussion to the essential impacts.

The Federation represents affiliate organizations in every state in the country, several thousand sportsmen's and conservation clubs, and over two million people in all walks of life. Many of them are involved in trying to understand the impacts of federal projects, both positive and negative. Many seek to comment on them, both pro and con. Your new regulations will make this process work better for them and thereby, we think, for better decisions as well.

Sincerely,

THOMAS L. KIMBALL
Executive Vice President

Natural Resources Defense Council, Inc.

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[illegible]enry Fonda Seymour, Jr.
[illegible]ld Zorn
[illegible]ert C. Train
[illegible]ence A. Tucker
[illegible]ohn Adams Buggie
[illegible]ff Zeigler, Jr.
[illegible]. D. Adams
[illegible]ecutive Director

January 24, 1979

Nicholas C. Yost, Esq.
General Counsel
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, DC 20006

Dear Nick:

We at NRDC have long considered the National Environmental Policy Act as the most basic implement which the law provides to foster environmentally responsible decisions by public agencies. No small percentage of our limited resources have been expended in invoking and defending this legislation.

Yet NEPA, as implemented by most agencies, has often been an inefficient and inadequate palliative. Environmental analysis rather than environmental protection has often been pursued as an end in itself.

We therefore welcome the newly promulgated CEQ regulations. They are designed to produce not only better analysis but better decisions, while minimizing the time and effort which past practices have exacted of both federal agencies and public participants.

Without minimizing the problems which we expect to encounter in the agencies' implementation of these regulations, we are confident that they represent an important improvement over the pre-existing guidelines.

We commend the CEQ for putting NEPA on a more productive course.

Sincerely,

John H. Adams

Office of the Governor

George Busbee
GOVERNOR

Atlanta, Georgia 30334

January 4, 1979

Norman Underwood
EXECUTIVE SECRETARY

Mr. Charles Warren, Chairman
Executive Office of the President
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, D.C. 20006

Dear Charles:

On behalf of the National Governors' Association, I want to extend my appreciation for your assistance in helping us resolve problems with the revised implementation procedures for the National Environmental Policy Act. You and your staff afforded us every effort to address the majority of our concerns...

The Council should be commended for reacting promptly to our concerns and for the substantive changes affected. I can assure you that the states are committed to working with you and the federal agencies to ensure that the regulations work.

If implementation of the regulations surfaces difficulties that we had not visualized during the recent negotiations, it is my hope that we would again be able to work with you to affect any needed changes.

Again, my personal thanks for a job well done.

Sincerely,

George Busbee

GB:ghr

bcc: Dave Johnson HCA
Leonard Ladbetter
Joe Tanner
Nicholas Yost CEQ

ENVIRONMENTAL REVIEWS OF TRADE AGREEMENTS

Statement of

Judith Hippler Bello
Sidley & Austin
Former General Counsel to the U.S. Trade Representative[1]

before the

Senate Committee on Environment and Public Works

July 22, 1993

Good morning, Mr. Chairman, and members of this committee. I am pleased to be here today to share my ideas on how best to reconcile two of America's most important objectives: promoting economic growth and job opportunities through trade, and protecting the environment.

I will not limit my focus here today to the June 30th ruling of the U.S. District Court for the District of Colombia in Public Citizen v. Office of the United States Trade Representative. As you well know, the court ordered the Trade Representative to issue an environmental impact statement with respect to the North American Free Trade Agreement "with all deliberate speed." In my view, that decision is bad law and bad policy. I am optimistic that it will be overturned in the expedited appeal that is underway, on one or more grounds.

First, the court lacks jurisdiction because the action to date regarding the North American Free Trade Agreement (NAFTA or Agreement) is not final. Under the Administrative Procedure Act (APA), no court has jurisdiction until there is "final agency action" to review. The action of the Office of the U.S. Trade Representative is not final because the action to be taken by the United States will be determined by the as yet unwritten implementing legislation.

No one knows better than you, Mr. Chairman, that this bill is virtually certain to include many provisions that are not required by the terms of the Agreement. For example, the United States-Canada Free-Trade Agreement Implementation Act includes, among others, provisions on fish, lobsters, potatoes, steel, wheat, meat, autos and auto parts, and, perhaps most notably, the so-called Baucus-Danforth subsidy provisions -- none of which was required to implement that agreement.

Suppose, for example, that the NAFTA implementing bill were to appropriate a treasure chest for environmental clean-up. Obviously such an appropriation, not required by the Agreement, would dramatically alter any likely effect of the Agreement on the environment.

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[1] The views presented in this statement are my own, and do not represent Sidley & Austin or any of the firm's clients.

Yes, the terms of the NAFTA are final, but they will be supplemented through the side accords still being negotiated and they depend, for any effectiveness in U.S. law, upon as yet nonexistent implementing legislation.

The court further lacks jurisdiction because final NAFTA action is not taken by an agency within the meaning of either the APA or NEPA, but rather by the President of the United States. Just last year, the Supreme Court ruled unequivocally that where the President has the final action, it is not subject to review under the Administrative Procedure Act. True, the President relies on his Trade Representative to negotiate trade agreements. But the President makes the critical decisions, and the President alone has the responsibility to decide (with lots of helpful advice from the Congress!) what provisions to include in the implementing bill. Under the Franklin v. Massachusetts precedent (as applied by the First Circuit recently in Cohen v. Rice), the court lacks jurisdiction.

Finally, the court lacks jurisdiction because the plaintiffs lack standing. Their original challenge under the NEPA and APA was dismissed by the U.S. District Court of the District of Columbia for lack of standing. Indeed, I understand that Judge Richey, who issued the June 30 ruling, dismissed, for lack of standing, a similar challenge by different parties to the Tokyo Round multilateral trade agreements in 1979 (in an unpublished ruling).

All of us have a stake in a comprehensive trade agreement like NAFTA; but the plaintiffs do not have any disproportionate stake that entitles them to invoke the court's review under the Administrative Procedure Act. The plaintiffs' allegations of injury are conjectural, their legal interpretation of the Agreement flawed. Moreover, even their alleged speculative injuries cannot be redressed by requiring the Trade Representative to prepare an environmental impact statement.

Finally, aside from the ample jurisdictional bases for reversal, I believe there are constitutional grounds on which to overturn the June 30th ruling. Of course, the Congress has a constitutional role to play with respect to trade agreements. Trade falls precisely, precariously at the interstice of the President's constitutional authority to conduct the foreign affairs of the United States, and the Congress' constitutional authority to regulate commerce and pass legislation. The "fast track" was invented in the Trade Act of 1974 to forge a frail, fragile, but vital partnership between the executive and legislature for international trade negotiations and implementing legislation. With the fast track procedures, trading partners have at least a reasonable degree of confidence in the President's ability to speak with one voice for the United States in trade negotiations.

However, if this already frail arrangement is subject to intervention by the judiciary as well, provoked by any special interest group concerned about some particular aspect of the negotiations or agreement, then our trading partners, understandably, will not negotiate meaningfully with us. Who could blame them?

The application of NEPA, with the delays attendant in judicial review under the APA, would kill fast track trade agreements. Yes, there are some international

agreements that can withstand substantial delays. Some treaties may languish for a decade or more before the Senate gives its advice and consent to ratification, without imperilment. This is because they are far less controversial. Who would call an urgent press conference or roam the halls of Congress to express vital concern about, for example, the United Nations Convention on Contracts for the International Sale of Goods?

Fast track comprehensive trade agreements are different: they can be extraordinarily controversial and time-sensitive. To achieve access abroad for our goods and services, we must reciprocally provide access to our market. Proposals to open our market to competition provoke adamant opposition by the beneficiaries of the status quo. The beneficiaries of open markets and more trade vastly outnumber the beneficiaries of closed markets and less trade, but they are not as vocal.

The Congress tends to hear more from the few that are unhappy with a trade agreement than the many who will benefit from it. This complicates the politics of comprehensive trade agreements, and makes them particularly time-sensitive. Once an agreement is finally achieved through executive negotiations (with ample advice and assistance from the Congress, legions of private sector advisers and the public), it is imperative for the Congress to proceed expeditiously to consider it.

Therefore, the Public Citizen ruling is bad policy as well as bad law. To subject fast track comprehensive trade agreements to NEPA environmental impact statements, subject to litigation under the APA, is to derail them. Without trade agreements, we would be far less competitive in the global market; the result would be fewer exports, fewer jobs, slower economic growth, a diminished future for America, and, I believe, a less well protected environment.

If the Public Citizen ruling is the wrong way to reconcile trade and environmental objectives, what is the right way?

The best way to reconcile environmental and trade objectives in trade negotiations is to take environmental considerations into account at the beginning of trade negotiations, not the end. The NAFTA negotiators sought to do precisely that: they undertook an unprecedented environmental assessment at the outset of the NAFTA negotiations, when the results of that assessment could be used to make more informed decisions about U.S. positions in the negotiations. Moreover, they:

- solicited public comments on the proposed agreement and its likely environmental effects,
- held a series of public hearings across the nation,
- received testimony from over 260 witnesses and over 400 written submissions,
- provided an opportunity for the public to inspect the transcript of such hearings,

- o released to the public a draft environmental review in October 1991, which invited public comment, and
- o took all comments received into account in the final review.

Perhaps the process the NAFTA negotiators began could be further improved. While USTR made its draft assessment publicly available for comment, it did not formally publish a notice thereof in the Federal Register requesting comments, or publish a Federal Register notice subsequently explaining its response to the comments received. In fact, I believe interested parties were able to participate meaningfully in this process, and their views were taken into account (if not always agreed with). However, it may be useful, in future post-NAFTA, post-Uruguay Round negotiations, to use Federal Register notices to enhance the appearance of the solicitation and consideration of public views on a draft assessment of the likely environmental implications of a trade negotiation.

It also might be useful to undertake some "alternatives analysis" early in a comprehensive trade negotiation, identifying alternative ways to accomplish a particular trade objective with differing environmental effects. Once alternatives are identified, trade negotiators can make a more informed decision about how best to achieve their trade objectives in the way most compatible with environmental objectives.

Of course, environmental policies and issues should be considered in the course of trade negotiations. However, in my opinion, the NEPA-APA model is not useful in comprehensive fast track trade negotiations. Indeed, it is distinctly, dangerously counterproductive: it is likely to generate litigation gridlock and so jeopardize market-opening agreements.

Environmental issues should be considered and assessed early enough in the trade negotiating process to have the maximum opportunity to shape the outcome of negotiations. Of course, environmental assessments necessarily will be broader gauge at that stage, but they can best influence U.S. negotiating positions and thus the results. Moreover, to the extent that any further analysis may be desirable at the conclusion of negotiations, it must be conducted on a timely basis, not subject to litigation and its attendant delays.

In conclusion, the legislative implementation of a fast track trade agreement is a political process fully under the control of the Congress, as provided by Article I of the Constitution. The Congress has underscored repeatedly its concern about the likely environmental effects of any trade agreement with Mexico, and particularly its insistence on protecting the sovereign right of the United States to establish its own environmental standards at the level of protection it feels necessary. Time and again, the Congress has stressed its intention to take environmental effects seriously into account when voting to pass or defeat the NAFTA. The appropriate forum for debate on the NAFTA, including its likely environmental effects, is the United States Congress, not United States courts. The appropriate process is political, not judicial.

In my view, the NAFTA is overwhelmingly in our national interest, including our environmental interest. With the NAFTA, we have more leverage with which to protect the environment beyond our borders on this continent, and no less legal right or sovereignty to protect the environment in the U.S. as we consider appropriate. Those who disagree are free to exercise their constitutional right to petition the Congress to reject the NAFTA, just as those of us who support the NAFTA are free to urge the Congress to support its implementation. For both these groups, the appropriate forum for debate is the Congress, not the courts.

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NAFTA, NEPA, AND THE SEPARATION OF POWERS

PREPARED STATEMENT OF LAURENCE H. TRIBE*

BEFORE THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

July 22, 1993

I am honored to have been invited to testify before this Committee on the constitutional issues raised by the recent decision of the District Court for the District of Columbia directing the U.S. Trade Representative to prepare an environmental impact statement on the North American Free Trade Agreement (NAFTA) pursuant to the National Environmental Policy Act (NEPA).

The decision is now pending on expedited appeal in the D. C. Circuit. It is not my purpose either to predict the outcome of that appeal or to seek to influence it, but merely to address broad constitutional issues that were not fully canvassed in the District Court's opinion of June 30, 1993. See Public Citizen v. Office of the U.S. Trade Representative, No. 92-2102, 1993 U.S. Dist. LEXIS 8682 (D.D.C. June 30, 1993).

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I. APPLICABLE CONSTITUTIONAL PRINCIPLES

Although Congress's legislative powers under Article I permit it to require executive and independent agencies to prepare environmental impact statements for major federal actions "significantly affecting the quality of the human environment," and although the fact that an agency answers to the President does not immunize it from this requirement, the President's own Article II powers cannot be similarly redesigned.

Negotiating a treaty, proposing legislation, or nominating a Secretary of the Interior all may have an environmental impact, yet no one could require these acts to be accompanied by substantive environmental studies. This much is common ground, or ought to be.

The converse is that, when exercising its Article I powers, such as considering proposed legislation or deciding whether to give its consent to a nomination, Congress as a body -- or the Senate where it is assigned the responsible role -- may be expected to undertake its own studies and may even refuse to ratify a treaty which is unaccompanied by certain studies by the Executive Branch. Whether to insist on such studies is up to the Congress to which the legislation has been proposed, or the Senate whose assent is sought.

On the face of it, the District Court's decision appears to contradict these principles by conditioning the President's exercise of core Article II functions -- in this case, the proposal of legislation (here, legislation implementing an executive

agreement with a foreign nation) for approval by Congress -- on the prior preparation and submission of an environmental impact statement.

II. THE RELEVANCE OF THE OFFICE OF THE TRADE REPRESENTATIVE

As to the role of the Office of the Trade Representative (OTR), nothing in the constitutional design or the separation of powers which it embodies turns on whether the relief granted is directed to the Trade Representative rather than the President himself. By statute, the Trade Representative as head of the OTR is explicitly placed "within the Executive Office of the President," and serves at its pleasure. See 19 U.S.C. § 2171 (b)(1). It would make little sense to argue that a court has imposed no constraints on the President's power to negotiate agreements with other nations or on his power to propose implementing legislation whenever the court's order is directed to the President's "agent" rather than to the President personally.

It is of course true that the OTR has statutory authority to coordinate and direct other agency actions, as well as to perform a number of other duties, and thus that the OTR has functions independent of advising the President. For example, the functions of the OTR include such independent responsibilities as reporting directly to Congress, see 19 U.S.C. § 2171(c)(1)(C), and consulting with congressional committees, see 19 U.S.C. § 2211(c). But this does not alter the basic analysis. Any OTR action, at least of the sort involved here, is subject to the specific

direction of the President, who can ultimately order the OTR to act or not to act. For instance, ordering the President's speechwriter to put something -- about environmental impact, for example -- into the speechwriter's draft of the State of the Union Address, or into the Address as ultimately delivered to Congress, would be no less an intrusion into the President's Article II powers just because the speechwriter might also be assigned some independent duties, such as writing speeches for other officeholders.

In short, the Trade Representative is an extension of the President for purposes of NAFTA's introduction to Congress and in all likelihood cannot constitutionally be required by Congress, or by an Article III court acting under the puported aegis of an Act of Congress, to include an environmental impact statement for NAFTA when the Trade Representative, acting on behalf of the President, submits NAFTA for consideration by Congress.

III. THE RELEVANCE OF THE FAST-TRACK CONTEXT

Fast track is a procedure, devised in the Trade Act of 1974, 19 U.S.C. §§ 2191-93, for expedited legislative consideration authorized by Congress's Article I authority to determine the rules of its proceedings. The fast-track procedure has two functions: to ensure ongoing congressional input into trade agreement negotiations; and to improve the President's negotiating position with international trade partners by enabling him to guarantee that Congress will decide on the final agreement promptly. This procedure has been applied to any legislation implementing a trade

agreement entered into under § 1102(b) or (c) of the Omnibus Trade and Competitiveness Act of 1988 before June 1, 1991, provided that:

-- in the case of bilateral agreements, the foreign country requested the negotiation and the President provided at least sixty days' notice to the Senate Finance and House Ways and Means Committees of his intention to enter into negotiations;

-- the President notified the House of Representatives and Senate of his intention to enter into the agreement at least ninety calendar days before the day on which he entered the agreement;

-- after entering into the agreement, the President submitted to the House and Senate the agreement, a draft implementing bill, a statement of administrative action proposed to implement the agreement, and detailed supporting information, including a statement explaining how the agreement makes progress in achieving the negotiating objectives established in § 1102; and

-- both the House and the Senate did not separately agree to procedural disapproval resolutions within the sixty-day period, making legislation to implement a trade agreement ineligible for fast-track procedures on the basis of the President's failure or refusal to consult with Congress on trade negotiations.

Essentially, then, the fast-track procedure is a forum for, and a form of, bicameral congressional consideration and approval. Congress agrees to impose limitations on itself in exchange for commitments by the President. In notifying Congress of an intention to negotiate the international agreement under the

fast-track procedure, the President commits the Executive Branch to consultation with Congress concerning the agreement and implementing legislation. In exchange, Congress commits to certain internal rules changes that are designed to guarantee an expeditious consideration of a completed agreement and any proposed implementing legislation when presented to it. Specifically, the fast-track procedure bars any congressional amendment of the agreement, automatically discharges the agreement from committee consideration after 45 legislative days, and prevents filibusters by limiting debate on the floor of each House to 20 hours and requiring that the package be voted on within 15 legislative days. See 19 U.S.C. § 2191(f) & (g). If a majority of either the House Ways and Means or the Senate Finance Committee disapproves of the trade agreement before the President submits it, or a committee or one of the Houses does so after submission, the President is free to resubmit the agreement under normal legislative procedures.

The fast-track procedure does not appear to constitute a legislative veto, which was invalidated in INS v. Chadha, 462 U.S. 919, 946-48, 957-59 (1983). See Public Citizen v. Office of U.S. Trade Representative, 972 F.2d 916, 917 n.2 (D.C. Cir. 1993). For if one of the committees disapproves of the trade agreement, this disapproval merely switches the disagreement from fast-track consideration to unexpedited legislative approval procedures. In this case, the President could resubmit the package after further negotiations, and request ad hoc fast-track consideration, notwithstanding the prior committee disapproval. Moreover, the

vote of a committee to reject the agreement or the failure of the President to comply with the fast-track procedure set forth in the Trade Act would not deny him the ability to request that Congress accept a trade agreement which would reverse a prior trade barrier decision made by Congress pursuant to its Article I authority to "lay and collect Taxes, Duties, Imposts and Excises."

From the standpoint of the President, the fast-track approval process has an obvious appeal, in that it will generally be easier to obtain the approval of a mere majority of both Houses of Congress than the approval of two-thirds of the Senate. However, Congress expressly reserves the right to change the internal rules defining the fast-track procedure at any time. See Trade Act of 1974, § 151(a)(2) at 2001. This raises the possibility that Congress will decide, even after a President has followed all of the requirements for fast-track consideration, to modify the fast-track rules.

Although Congress cannot place prior conditions on the President's exercise of his power to negotiate treaties or executive agreements, propose legislation, and the like, it is possible to argue that, beyond Congress's constitutional authority to regulate interstate and foreign commerce, the entire fast-track trade agreement procedure, under which Congress will approve or disapprove NAFTA, is a creation of Congress itself. Given this genesis, it might be claimed that it is only through the Trade Act that the President is able to formally propose NAFTA on the fast track, and that Congress can therefore require submission of an

environmental impact statement under NEPA as part of the internal rules which Congress constructs to expedite matters (e.g., because the short time for the fast track will prevent Congress from conducting a full investigation of the proposal's environmental impact).

But there are many serious, and probably fatal, flaws in this argument. Trade accords like NAFTA are ordinarily negotiated as non-self-executing executive agreements. Thus, while they are not deemed treaties requiring the advice and consent of the Senate, they may require implementation either by congressional enactment or by executive branch regulation pursuant to preexisting statutory authority.

There is no escape from a very basic dilemma: Either (1) the substantive character of NAFTA requires that it be ratified as a treaty by two-thirds of the Senate -- an unlikely hypothesis but one in which neither Congress nor the President could in any event use the fast-track process to bypass or bargain away the Senate's institutional role; or (2) no Senate ratification is constitutionally necessary, in which case the Administration may formally propose that NAFTA be considered on the fast track on an ad hoc basis even without the environmental impact statement that NEPA might be construed to mandate -- simply as part of the considerable latitude that constitutional principles effectively give the President for proposing legislation.

Moreover, even if the fast-track procedure were expressly to incorporate an environmental impact requirement, it is

universally agreed that one Congress cannot, consistent with the Constitution's basic design, bind future Congresses as to the conditions under which they will consider proposed legislation. Yet the District Court's June 30 order accomplishes just that by constraining the circumstances under which the 103d Congress is permitted -- supposedly in accord with what the 91st Congress decreed in NEPA -- to consider NAFTA pursuant to the Trade Representative's submission of that trade agreement at the direction of the President.

Article II, Section 3 of the Constitution provides that the President "shall from time to time ... recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." This provision imposes some obligation (albeit minor) on Congress. Congress must consider the President's recommendations, but of course need not take additional steps to transform these recommendations into law. Still, Congress must accept tender of the recommendations and examine them. Indeed, the plain meaning of "consideration" entails contemplation, attentive thought, and reflection. Although Congress may ultimately, after doing its own investigation and research, reject NAFTA (just as the Senate could decide not to ratify it if it were submitted as a treaty), Congress can no more waive its duty to consider legislation proposed by the President than either Congress or the President can waive the President's duty under the Constitution to make recommendations "necessary and expedient" to changing law or policy. Thus, if any Act of Congress were construed to authorize

what the District Court did here, Congress would be infringing on both the President's and its own institutional roles -- in addition to possibly invading the Senate's role -- by constricting the recommendations which the President could make and which it could consider.

IV. THE ROLE OF NEPA

In any event, Congress has not purported to condition access to its fast-track procedures on submission of an environmental impact statement. To treat NEPA's requirement as part of the fast-track quid pro quo between Congress and the President would misrepresent both NEPA and the fast-track procedure, which strikes its own distinctive balance between the need for rapid action and the need for ample consultation and consideration.

To be sure, NEPA requires that the initiation of "all federal actions significantly affecting the quality of the human environment" be preceded by the preparation of an environmental impact statement. 42 U.S.C. § 4332(2)(c). And it is true that the breadth of this requirement, read literally, would cover virtually any and all "proposals for legislation," id., including those which the President might make in a speech to the nation. Clearly, however, one cannot make sense of this language without considering the purposes of NEPA -- which are completely unrelated to the fast-track procedure for trade agreements -- and without considering as well the separation of powers axioms in light of which any Act of Congress should be construed. Cf. Public Citizen v. United States

Dept. of Justice, 441 U.S. 440, 466 (1989) (construing the Federal Advisory Committee Act in a way short of its literal scope to avoid imposing constitutionally dubious substantive constraints on the President's power to make judicial nominations); id. at 482-89 (Kennedy, J., concurring)(same).

The environmental impact statement requirement is not, after all, an internal rule of Congress, and it has never been connected with the fast-track procedure. But it must be stressed that, even if the environmental impact statement requirement were viewed as, or were amended so as to become, part of the package which Congress and the President have hammered out together for consideration of NAFTA (or, indeed, of other trade agreements negotiated on the fast track), there would remain the serious constitutional problems of one Congress purporting to bind future Congresses with respect to consideration of legislation, and of Congress, with or without the aid of the Federal Judiciary, restricting the President in the discharge of his core Article II powers.

Although the District Court's determination to apply NEPA's environmental impact statement requirement broadly is understandable, this cannot justify infringements on the separation of powers. In its decision, the District Court reasoned that because "[t]he NAFTA is a completed document which has been signed and agreed to by the three heads of state for the United States, Canada, and Mexico," and "[t]he only remaining step to be taken regarding the NAFTA is a domestic one," "an application of the NEPA to the NAFTA will not impede the President's power in any

meaningful way." Public Citizen, 1993 U.S. Dist. LEXIS 8682, *17. However, it is plainly unacceptable for an Article III court to decide how burdensome the preparation of an environmental impact statement would be to the President's authority, or to what degree it would invade his institutional role. The District Court also stated that that "the OTR could have very easily begun the EIS process earlier in the NAFTA negotiation process and thus any tight timetable for the preparation of an EIS on the NAFTA is entirely the result of the inaction by the prior administration." Id. at *29 n.15. But this weighing of the equities is simply inappropriate in the present context, where the issue is not the exercise of equity jurisdiction but, rather, the separation of powers.

* * *

Despite the sweeping language of NEPA, despite the fast-track context, and despite the care that Judge Richey took not to direct his order to the President personally, it is hard to avoid the conclusion that the District Court's well-intentioned determination to ensure that serious environmental concerns are fully addressed in the procedure by which NAFTA is proposed to Congress is incompatible with our constitutional design.

THE PROFOUND ENVIRONMENTAL EFFECTS OF INTERNATIONAL TRADE AGREEMENTS

TESTIMONY BEFORE THE U.S. SENATE
ENVIRONMENT AND PUBLIC WORKS COMMITTEE
JULY 22, 1993

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70-778 34

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I. INTRODUCTION

Good morning, Mr. Chairman. I am Rodger Schlickeisen, President of Defenders of Wildlife (Defenders), a national non-profit conservation organization of approximately 80,000 members, dedicated to protecting endangered species and biological diversity.

Since 1991, when President Bush sought "fast-track" authority to negotiate the North American Free Trade Agreement (NAFTA) and a General Agreement on Tariffs and Trade (GATT) arbitral panel found provisions of the U.S. Marine Mammal Protection Act to be GATT-illegal, the issue of "trade and the environment" has been the topic of much political and academic debate. Defenders has been actively involved in this debate, and I sincerely appreciate the opportunity to address the Committee today on the environmental effects of international trade agreements.

Defenders strongly believes that liberalized trade and environmental protection are not mutually exclusive ends, and can be mutually reinforcing. This is why we gave support to NAFTA several months ago, on the condition that certain provisions relating to environmental enforcement, standards protection, funding, and public participation were included in the proposed supplemental agreement. A successful integration of the two, however, has proved to be rather difficult, as traditional supporters of liberalized trade have grossly underestimated, or perhaps even misrepresented, the profound effects that international trading rules have upon environmental protection and sustainable development. It is truly unfortunate that the caution voiced by many environmentalists to international trade agreements has been interpreted by so many as an objection to liberalized trade.

Perhaps the most incredible aspect about the trade and the environment conflict is the extent to which the public is consciously excluded from the debate. For instance, there are limited formal mechanisms to comment upon the standards established by trade agreements to judge environmental laws. Also, the dispute settlement procedures of these agreements allow for no public input. The result is that democratically-passed environmental and conservation laws can be subverted by international bureaucrats whose accountability is very limited. This procedural backdrop casts an ominous shadow upon the substantive environmental conflicts related to international trade agreements.

These substantive conflicts have centered on two unresolved questions, from which essentially all trade/environment problems flow:

1) What is the legal relationship between international trading regimes and national environmental standards?

Because the international trading regime seeks to eliminate barriers to trade, domestic (and even multilateral) efforts to limit or eliminate certain trade for legitimate environmental reasons is often labelled "protectionist" or "trade-distorting." These labels are used even if the trade measures in question meet the fundamental criteria of trading relations: non-discrimination and national treatment. The result is that legitimate environmental laws are subject to attack by trade agreements. And, if a country like the U.S. wants to honor its trade commitments, it is presumably forced to either change its environmental laws, face retaliatory trade measures, or offer compensation.

2) What environmental rules should govern international trading regimes?

Once the essential relationship between international trading organizations (like GATT) and sovereign governments is defined, the substance of the trading organizations' rules must be analyzed. From an environmental perspective, the present international trading rules probably distort trade much more than the occasional environmentally-based import or export restriction because the rules fail to reflect the true environmental costs of goods and services (not to mention those related to transportation). The result of this cost externalization is the very real tendency to exploit natural resources for quick export-driven profits, particularly in lesser developed countries.

If Congress and the American people are to fully understand the effects of trade agreements upon the environment, these aforementioned procedural and substantive concepts must be honestly analyzed.

II. NEPA IS (AND SHOULD BE) APPLICABLE TO NAFTA

A. A BRIEF OVERVIEW OF NEPA

The National Environmental Policy Act of 1969 (NEPA) is the crown jewel of federal statutes designed to protected the environment. In passing it, Congress for the first time recognized "the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances ..." If the U.S. truly wants to come to grips with the root questions of the trade/environment conflict, with the type of public input that is presently lacking, there is no better tool than NEPA. Indeed, the entire point

of the NEPA process is to foster informed and intelligent debate on significant environmental issues.

Despite NEPA's strong language, Congress was careful to limit the legal obligations engendered by NEPA. Thus, NEPA applies only to federal entities, not private parties. In addition, NEPA does not mandate particular environmental decisions. Instead, it focuses upon the process of federal "decisionmaking." To ensure that such decisionmaking is environmentally sound, NEPA requires federal agencies to prepare, among other things, an environmental impact statement (EIS) for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." In other words, federal agencies are generally asked by NEPA to adequately explain the environmental effects of their actions to the public, as well analyze potential alternatives and impacts. The rationale behind this process is not to elevate environmental concerns over other appropriate considerations, but to require the agency in question to take a "hard look" at the environmental consequences of a proposed action.

B. NAFTA AND THE ENVIRONMENT

The proposed North American Free Trade Agreement (NAFTA) already possesses a storied environmental history. Its 2000 page text could affect many U.S. federal, state, and local laws. A proposed supplemental agreement will create an international commission to help enforce existing environmental laws and investigate environmental "hot spots." Liberalized trade under NAFTA will greatly influence new production and consumption patterns.

Yet, NAFTA's effect upon the environment is but one notable example of the larger general relationship between international trade and environmental protection. On a constantly shrinking planet, bound by a diverse trade flow of goods and services, international trading rules have a profound effect upon investment patterns and development decisions, which in turn have a profound effect upon the world's environment. Expanded trade can also provide increased financial resources for investment in environmental protection, particularly in lesser developed countries. NAFTA, therefore, is only an appetizer for a much larger trade/environment menu. After NAFTA, there will be Congressional consideration of the Uruguay Round of the General Agreement Tariffs and Trade (GATT), a possible western hemisphere trading block, and a potential agreement with the Pacific Rim countries.

NAFTA itself reflects its relationship with the environment by stating that the promotion of trade should proceed in "a manner consistent with environmental protection and conserva-

tion," in a way that "promote(s) sustainable development," and that "strengthens the development and enforcement of environmental laws and regulation." President Clinton has sought to build upon these hortatory goals by calling for increased environmental protection in a NAFTA environmental supplemental agreement. In fact, supplemental negotiations on the environment between the U.S., Canada, and Mexico are occurring as I speak. Outstanding environmental issues include funding, standards protection, better environmental enforcement, greater access for public participation, and the creation of a North American Commission on the Environment (NACE).

C. NAFTA AND NEPA

As we all know, the legal question of whether NEPA applies to NAFTA is the subject of an Administration appeal of a June 30 district court decision, which answered the question in the affirmative. Defenders strongly agrees with Judge Richey's decision. In sum, we believe that the Office of the U.S. Trade Representative (USTR) is a "federal agency" that, in negotiating and attempting to implement NAFTA, is engaging in a "major federal action" and a "proposal for legislation," which will be "significantly affecting the quality of the human environment." Although I am not a lawyer or a legal expert, I am not sure the language of the statute, as applied to these facts, could be much clearer. See NEPA, 42 U.S.C. Sections 4321 et seq. NEPA regulations promulgated by the Council on Environmental Quality (CEQ) also strongly indicate that trade agreements are subject to NEPA.

In addition, we believe there exists some confusion about the roles that the President, USTR, and Congress have played vis-a-vis the ongoing NAFTA process. Political realities shed some light on the Constitutional and legal conundrum this Committee faces.

First, although the Omnibus Trade and Competitiveness Act of 1988 states that it is the President who enters into trade agreements and decides whether to send the implementing legislation to Congress, the reality is that USTR is primarily responsible for these actions. USTR, not the President, leads the interagency process to develop national trade/environment policy. USTR, not the President, leads the U.S. delegation to negotiate trade agreements. USTR, not the President, drafts the implementing legislation with Congress. In reality, this situation is also no different from when the State Department negotiates international treaties. While the President is, of course, ultimately responsible for a treaty's contents (with the advice and consent of the Senate), the State Department is the lead agency responsible for preparing an EIS in these situations. Other agencies that have prepared EISs for international agree-

ments or projects include the Department of Commerce, the Environmental Protection Agency, the Department of the Interior, the Agency for International Development, and the Export-Import Bank.

Second, I find it very hard to believe that Congress as a whole ever intended to "waive" other statutes, like NEPA, when it passed the 1974 Trade Act (as amended), which established the mechanism for "fast-track" negotiating authority. In the historical context of the 1930 Smoot-Hawley Tariff Act, fast-track is merely a Congressional compromise to the traditional trade tensions between the legislative and executive branches. Fast-track is not a complete delegation of Constitutional or statutory power from Congress to the executive. If this were the case, the Clinton Administration would not be as concerned as they are about Congressional opinion on NAFTA. Fast-track is a limited and specific delegation of power, and does not relieve existing statutory obligations.

Third, NEPA application to NAFTA and other international trade agreements will not impinge upon the President's Constitutional authority to enter into trade agreements. It will also not prevent the President from submitting such agreements and implementing legislation to Congress. An EIS will merely give the other branches of the federal government, and the general public, a better understanding of trade agreements' environmental ramifications, which will be crucial in determining whether Congress votes to change U.S. law for a trade agreement. Furthermore, nothing in NEPA dictates that an EIS and/or LEIS need interfere with the time pressures often necessitated by international trade agreements or fast-track authority.

III. MAKING NEPA WORK FOR NAFTA AND OTHER TRADE AGREEMENTS

Although it would be highly presumptuous to attempt to describe today exactly how NEPA should relate to trade agreements, I will attempt to construct a framework that the federal government could follow in fully answering this question.

Ideally, and certainly for trade agreements after NAFTA, USTR should propose rules in the Federal Register, with opportunity for public comment and hearings, that lay out the agency's NEPA obligations with regard to trade agreements. The State Department, for example, has long ago promulgated such rules for its treaty making actions. As long as the fundamental requirements of the statute are met, the NEPA "shall in no way affect the specific statutory obligations of any Federal agency" and its provisions "are supplementary to those set forth in existing authorizations of Federal agencies." When analyzed in this light, there is no need for Congress to amend NEPA.

As appealing as a rational NEPA rule-making process for USTR might be vis-a-vis NAFTA, we acknowledge that the timing of the

agreement, as well as the legal confusion surrounding NEPA's application to it, dictate a more pragmatic solution. Therefore, to get us out of this present logjam, we propose that USTR prepare a Legislative EIS (LEIS), a particular and less burdensome environmental impact assessment allowed by CEQ regulations. A LEIS would accompany the implementing legislation to NAFTA, which itself includes the actual agreement and any supplemental agreements. The advantages of this approach are:

* Scoping is not required.

* Only one LEIS is generally needed to be drafted and released the to public (as opposed to a "draft" and "final" EIS).

* Public comments must be sought, and USTR must forward them to Congress along with its own responses.

* The LEIS must be transmitted to Congress up to 30 days after formal transmittal of a legislative proposal, and before legislative hearings or formal deliberations on NAFTA begin.

The Bush Administration's "Review of U.S.-Mexico Environmental Issues" demonstrates that it is possible for USTR to assess the environmental effects of NAFTA in a relatively short time frame. In September 1991, three months after the NAFTA negotiations first began, USTR released a 200-page draft, and after receiving public comments, produced a "final" 250-page environmental review in February 1992. In fact, several officials in the Bush Administration even proposed preparing the substantive contents of this document as an EIS, but they were overruled. Therefore, we maintain that preparing an LEIS on NAFTA would entail, for the most part, pulling together existing information, analyzing alternatives and associated impacts, and then allowing the public to comment upon it.

In the future, as a USTR rule-making process could flesh out, a more deliberate and holistic approach to assessing the environmental impacts of trade agreements (and implementing legislation) is necessary --

1) At the beginning of trade negotiations, USTR could scope all the relevant environmental issues that the U.S. would hope to cover in the proposed agreement, with opportunity for the public to comment.

2) As the trade agreement was being negotiated, leading up to its conclusion, USTR could prepare a draft EIS that reflected the actual contents of the proposed agreement.

3) Toward the end of negotiations, USTR could release the draft EIS to the public for comment. If under fast-track authority, a draft EIS could even be released as late as when the President

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notifies Congress of his intention to enter into an international trade agreement.

4) If under a fast-track timetable, USTR would have at least 90 days to respond to comments and prepare a final EIS. As an alternative, USTR could prepare a final EIS at the time it submitted its implementing legislation to Congress, or shortly thereafter, which would satisfy any potential LEIS requirement.

5) If necessary, classified information or trade secrets could be excluded from EISs based on the present Freedom of Information Act (FOIA) exemptions.

Again, this is just a suggested framework. USTR, as the responsible agency, should propose rules on NEPA's application to international trade agreements. Hopefully, our framework will reveal, however, that NEPA is not a big bad monster that will derail international trade agreements. Indeed, we vigorously maintain that NEPA will help make trade agreements environmentally, as well as economically sound.

IV. CONCLUSION

When discussing the application of NEPA to trade agreements, we must try to put the intense politics of NAFTA in perspective. The real debate should focus upon what we want the contents of international trade agreements to look like in the future. The relationships between trade and the environment are so deep that they will not only take a number of years to completely sort out, but will also be best resolved by applying democratic principles -- not short term political fixes. We must possess legal mechanisms that ensure thorough and intelligent discussions of trade/environment issues.

We must also recognize that USTR is now a major policy maker for the U.S. government, capable of negotiating trade agreements that could threaten U.S. laws, and that increase or decrease natural resource exploitation. There is no reason for this agency's actions to be given special treatment with regard to NEPA, particularly given the clear language of the statute. The Trade Representative is responsible for shaping environmental policy in an infinitely more significant way than, say, a Presidential speechwriter.

So, the question of NEPA's applicability really boils down to members of Congress because you possess the Constitutional power to legislate and to regulate commerce with foreign nations. Both these powers can be exercised without interfering with the President's power to enter into international agreements, and both these powers are consistent with the plain language of NEPA. But Congress must somehow assert its Constitutional powers in this instance or risk having them greatly diminished.

WWF

STATEMENT OF

KATHRYN S. FULLER, PRESIDENT
WORLD WILDLIFE FUND

before the
Committee on Environment and Public Works
United States Senate
July 22, 1993

Chairman Baucus, Senator Chafee, and members of the Committee, thank you for your invitation to appear before you today. I am honored to be part of this distinguished panel.

I understand this hearing to have two principal objectives: first, to examine the broad issue of what sort of environmental impact information is essential to trade negotiators and to Congress in negotiating and approving trade agreements; and second, to discuss whether the National Environmental Policy Act should be held applicable to trade agreements generally and to the North American Free Trade Agreement in particular.

I plan to limit my comments today to the first and broader of these areas of inquiry. I am not an expert on the Constitutional separation of powers nor on the details of the NEPA regulations, as are some of my fellow panelists. However, as an environmentally-conscious citizen, as well as in my role as president of the largest U.S. organization working internationally to conserve nature, I would hope and expect that *all* the activities of my government,

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including its international trade arrangements, would be undertaken with a firm understanding of their environmental consequences and with conscious efforts to minimize adverse impacts.

Whether this undertaking is required under NEPA, or whether Constitutional issues limit the applicability of NEPA to trade agreements, is by no means a trivial issue, but from an environmental perspective it is ultimately a discussion of the proper means to an important end. The end, which we must never lose sight of, is of course, more environmentally-protective trade policy and trade agreements.

WWF'S involvement in trade and environment issues

World Wildlife Fund has been directly involved in trade and environment issues for the past two and one-half years. In February 1991, we jointly sponsored, with the Overseas Development Council, a conference entitled Environmental Challenges to International Trade Policy. Later that year, WWF published a two-volume report entitled "A North American Free Trade Agreement: The Impacts on Wildlife Trade." In October 1991, our board chairman, former CEQ Chairman and EPA Administrator Russell E. Train, was appointed to the Advisory Committee on Trade Policy and Negotiations, where he worked closely with United States Trade Representative Carla Hills and her staff from the time of his appointment through to the close of the NAFTA negotiations. I now sit on the same committee, and I and my staff have advised U.S. negotiators on the supplemental agreement on the environment on more than a dozen occasions, including a meeting with Ambassador Kantor earlier this week.

I note also that WWF is a member of the larger family of national conservation organizations known collectively as the World Wide Fund for Nature. The staff of the

international secretariat in Gland, Switzerland, has produced several thoughtful papers on the broader issues of trade and environment.

Learning to assess environmental impacts of trade

It has only been in the past few years that the trade and environmental communities have begun to realize how truly interdependent their activities are. Twice in the past decade, the Office of the Trade Representative negotiated, and Congress approved, major free trade agreements with little or no obvious consideration of their environmental impacts.

Today, no serious observer of international economics can ignore the fact that trade liberalization agreements such as NAFTA can have major environmental consequences that need to be studied, understood, and addressed in the texts of the trade agreements themselves. But it is important to remember that what appears obvious today was unexplored territory just a short time ago. Our understanding of the linkages is growing daily.

Nevertheless, we should not delude ourselves that understanding the environmental effects of comprehensive trade agreements is a simple matter. As our colleague Jessica Mathews wrote in the *Washington Post* more than a year ago, the connection between trade and environment is a tangled knot whose strands go every which way and often conflict. Any trade agreement of the magnitude of NAFTA or one of the GATT Rounds will generate direct and indirect environmental effects, both positive and negative. The challenge facing the architects of such agreements is to predict reliably the negative environmental effects and minimize them, while maximizing the positive environmental benefits.

It is also critical to recognize that the baseline for predicting the environmental impacts of trade agreements is not static, but constantly moving. In other words, to understand fully the impact that a particular trade agreement will have, it is also necessary to predict what will happen to the environment without the agreement. Debates about the environmental impacts of trade agreements cannot be comparisons between the new trade regime and a perfect world, but rather between the new regime and the future without it.

Let me offer a couple of examples. The U.S.- Mexico border area, which has understandably commanded much attention in discussions of NAFTA, is clearly one of the most immediate environmental challenges facing policymakers in both countries. Any assessment of the environmental value of NAFTA must take into consideration the environmental future of the border area without the economic and political changes that NAFTA will bring.

Similarly, WWF has worked to focus attention on the future of tropical forest areas and biodiversity in Mexico. As noted in an opinion piece which I wrote for the *Wall Street Journal* last week, economic forces are already significantly reducing the amount of tropical forest in one of the world's most biologically rich nations. This is a negative environmental effect, trade-driven in part, but taking place in the absence of a NAFTA. The real challenge for us, then, is to predict how NAFTA, and its side agreements, will exacerbate or mitigate such impacts.

In taking up that challenge, and in speaking to the first question before the Committee today, I believe the following can be said about the NEPA-NAFTA controversy and the role of environmental impact assessment in negotiating and implementing trade agreements:

First, there can be little question that the environmental consequences of trade are broad, potentially profound, and in many instances will precipitate precisely the type of impacts that NEPA intended to analyze and disclose. That being said, and Constitutional and jurisdictional issues aside, there is a good question whether NEPA is truly an adequate vehicle to support the kind of environmental analysis and harmonization that trade policy demands.

NEPA was crafted in a simpler era, when our environmental perspective was more limited, and when our choices seemed more clearly drawn and sectorally-bound. In retrospect we may have been somewhat naïve, but NEPA, durable as it is, to some degree reflects the innocence of its age. Thus, an EIS prepared for a given project, such as a dam, or for a discrete policy, such as certification of a pesticide, may well be its most practical application. But an EIS on a 900-page omnibus revision of trade in virtually all goods and services between three nations may press the utility of an EIS to its breaking point, or at least beyond its intended role and primary function.

Let me be clear: this is not to say that an EIS is of no value. To the public, to the executive branch agencies, and to the Congress—it certainly is. I intend merely to underscore the enormousness of the task of analyzing the effects of trade on environment. Flows of capital and patterns of trade affect nearly all areas of the environment, in ways we are only beginning to understand. A complete environmental analysis of these impacts, at present, is quite probably beyond our grasp. Even were we to be presented with a perfect assessment at this moment in time, we would ultimately need more: an *ongoing* analysis of trade's impacts, and a commitment and an institutional framework to manage them now and in the future.

What we already know tells us that the real environment-trade issue transcends NEPA applicability, and that the "snapshot" of an EIS -- even a detailed and enlightened one -- is only a signpost pointing in the direction of more integrated environment and trade policy and management.

From an institutional perspective, I believe the real issue we ought to be concerned with is the strength and durability of the side agreements. As we envision it, the North American Commission on Environment, or NACE, holds the potential both to monitor closely and continually the environmental impacts of trade, and to provide guidance to the NAFTA parties on how to make trade and environment policies pull for common objectives throughout the North American continent. In terms of real environmental return for effort expended, I believe that the supplementary agreements, and the NACE in particular, are the best immediate focus and present the best long-term opportunity. This applies equally to identification of impacts, and to the ultimately more important task of avoiding and mitigating them in practice.

Environmental assessments of the NAFTA to date

Although the Office of the Trade Representative has not prepared a formal Environmental Impact Statement, much environmental analysis of NAFTA has already been done. Clearly, we cannot hope to precisely determine all possible environmental effects of an agreement as broad as the NAFTA, and therefore must focus on on-going monitoring and adjustment. However, from the point of view of bringing together useful information on which to base judgments, we have a good body of information from which to act.

The possible environmental consequences of the NAFTA have been discussed widely, by the government, by non-governmental organizations such as World Wildlife Fund and the

National Wildlife Federation, and by numerous universities and research organizations. In these inquiries, serious, though perhaps incomplete, attempts have been made to assess the effects of increases in investment on land and wildlife and on pollution, as well as the potential legal impacts on domestic and international laws and standards for human health and conservation of natural resources.

Assessments and discussions on environmental impacts began in earnest as the previous administration sought authority to begin "fast track" negotiations for a free trade agreement with Canada and Mexico. Before the negotiations began, several leaders from non-governmental environmental organizations met with senior administration officials to discuss the potential environmental effects of liberalizing trade across North America. Since most of the potential environmental issues seemed to involve the U.S. and Mexico, the administration agreed in its May 1st, 1991 "Response of the Administration to Issues Raised in Connection with the Negotiation of a North American Free Trade Agreement" that the US government would undertake a voluntary review of U.S. - Mexico environmental issues concurrent with the start of NAFTA negotiations.

An inter-agency task force was established to conduct the review. The task force was coordinated by the Office of the Trade Representative, and included participation from the Departments of State, Treasury, Commerce, Transportation, Justice, Interior, Health and Human Services, Energy, and Labor, as well as the Environmental Protection Agency, the Council on Environment Quality, the Council of Economic Advisors, and the Office of Management and Budget. The review which followed took nine months and included public hearings in six U.S. cities. 260 witnesses testified and over 400 written submissions were received. The review was

distributed in draft form on October 17, 1991, comments were received from forty-eight organizations, and the final version of the review was published in February 1992.

The outcome of that process, the *Review of U.S. - Mexico Environmental Issues*, does not, in my judgment, come close to capturing the full range of environmental issues raised by the NAFTA. Nevertheless, the *Review* points out that increasing personal and governmental incomes would increase demand for environmental services, as well as the potential for governments to provide them. And it flagged a number of problems which could arise under the proposed trade agreement, including environmentally-negative impacts of growth, product safety, hazardous waste disposal, loss of biological diversity, creation of "pollution havens", negative impacts on agricultural and industrial production, and undermining of domestic or international standards. It also made recommendations to the negotiators for avoiding or minimizing such problems.

In a ultimately more significant action announced in the same May 1st transmission to Congress, the administration encouraged environmental groups to become far more involved in examining the environmental aspects of trade by appointing several prominent environmental leaders to its various trade policy advisory committees, including WWF's board chairman Russell Train, The National Audubon Society's Peter Berle, the National Wildlife Federation's Jay Hair, The Nature Conservancy's John Sawhill, and the Natural Resources Defense Council's John Adams. These appointments led to WWF and other organizations stepping up their efforts to assess the possible environmental consequences of the NAFTA.

Efforts to assess the potential environmental impacts of NAFTA have been on-going. For example, the commitment of the Clinton administration to negotiate a supplemental agree-

ment on the environment has prompted a broad inquiry on the part of executive branch agencies. The interest of this and several other Congressional oversight committees in the environmental aspects of NAFTA has encouraged other non-governmental environmental organizations to assess various aspects of the potential environmental impacts of the agreement, and to publish a series of reports, written statements, and other documents. In addition, the increasing interest of the academic and foundation communities has encouraged a number of formal conferences and meetings, the proceedings of which are available to all interested parties.

In sum, although there is much that we cannot know or predict, a substantial record on the predicted environmental consequences of NAFTA has been developed, beginning early in the process when the negotiators were able to take certain steps to make the text reflect the new understanding, and continuing to the present time.

What the US government do for the NAFTA and for future trade agreements

Clearly, now that we understand how intimately trade and environment are linked, reliable environmental information is essential at various stages of the trade agreement process. Negotiators need comprehensive, practical, information on possible environmental consequences that they can consider as they develop a text during negotiations. The key is practicality and timeliness. Near the end of the process, Congress needs of different kind of information -- the best available information on the environmental implications of the completed trade agreement, so that it has an opportunity, as it participates in the drafting of implementing legislation, to ameliorate through domestic law environmental problems not adequately addressed in the text.

Regardless of the outcome of the present Public Citizen case, the United States Government should and must make a firm commitment to thoroughly assess the predicted environmental consequences of all future trade agreements before it begins negotiations. To that end, I urge the Administration to voluntarily take the following three actions:

1) With respect to NAFTA, the Administration should commit to publish and distribute a comprehensive document, well before the Congressional vote, of the positive and negative environmental consequences of the NAFTA package (including the supplemental agreement). The document should strive to compare the environmental effects of NAFTA with the predicted environmental effects should the status quo be maintained. The document should make recommendations for implementing legislation which minimize negative environmental impacts, and it should be developed in consultation with non-governmental organizations and other experts;

2) With respect to the Uruguay Round, the Administration should agree to publish and distribute a similar document before Congress considers approval; and

3) As regards all future trade agreements, the Administration should firmly commit, possibly by drafting an executive order, to assuring that agreements negotiated by this and later administrations will have a comprehensive, prospective environmental assessment done before the text is negotiated.

I urge this committee to help to ensure that the important issue of making the NAFTA, and all future trade agreements, reflect positive environment values not be lost in a haze of legal arguments. Regardless of the outcome of the present case, good public policy requires that the

best possible environmental information be available throughout the negotiation and Congressional consideration of trade agreements, and that cooperative mechanisms be established in all cases to monitor and respond to environmental challenges long after such agreements are formally approved.

The Application of The National Environmental Policy Act to the North American Free Trade Agreement

Testimony of
the Center for International Environmental Law
and the National Audubon Society

Before the Senate Committee On Environment and Public Works

Submitted by Robert F. Housman and Paul Orbuch
of the Center for International Environmental Law

Submitted August 9, 1993

Testimony of Robert F. Housman* and Paul Orbuch**
of the Center for International Environmental Law
Regarding the Application of
the National Environmental Policy Act
to the North American Free Trade Agreement
Before the Senate Committee On Environment and Public Works***
Submitted on Behalf of the
Center for International Environmental Law
and the National Audubon Society

This testimony, submitted on behalf of the Center for International Environmental Law and the National Audubon Society, addresses the legal issues arising from the application of the National Environmental Policy Act (NEPA)[1] to the North American Free Trade Agreement (NAFTA).

Introduction

On June 30, 1993, the United States District Court for the District of Columbia issued an opinion and order requiring the United States Trade Representative's Office (USTR) to prepare, pursuant to NEPA, an environmental impact statement (EIS) for NAFTA.[2] This decision has caused a flurry of debate regarding the legal and policy issues surrounding the application of NEPA to NAFTA. Much of the debate over the district court's decision has been ill informed[3] and thus it is necessary to clarify the legal application of NEPA to NAFTA. This testimony discusses first the substantive application of NEPA to NAFTA, and then turns to the separation of powers issues raised.

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***This testimony is largely derived from Natural Resources Defense Council, Center for International Environmental Law, Defenders of Wildlife, National Audubon Society, Brief of Amici Curiae, Public Citizen v. United State Trade Representative, U.S. Court of Appeals for the D.C. Circuit, No. 92-521, filed Aug. 4, 1993.

[1]42 U.S.C. §§ 4321-4370d.

[2]Public Citizen v. United States Trade Representatives Office, No. 92-2102 (D.D.C., filed June 30, 1993) (Public Citizen).

[3]George F. Will, Judicial Exhibitionism, Wash. Post, July 8, 1993, A17.

I. NEPA and Its Application to NAFTA

A. NEPA

In order to understand the legal application of NEPA to NAFTA it is necessary to first have a basic understanding of what NEPA is and how it functions. NEPA has been described as a purely procedural law. NEPA does not dictate an outcome, rather it prescribes a process for reaching a final decision.[4]

NEPA has two principal goals: 1) to ensure that decision makers take environmental considerations into account; and 2) to ensure that Congress and the public have knowledge of the environmental impacts of decisions being taken.[5] To meet these goals, NEPA requires all federal agencies to prepare and make public an environmental impact statement for "every recommendation or report on proposals for legislation and other major federal actions significantly affecting the human environment."[6]

B. NEPA's Application to NAFTA.

As the district court held in Public Citizen NEPA applies to NAFTA because: 1) USTR is a federal agency; 2) approval and initialing of NAFTA is both a recommendation on a proposal for legislation, and a major federal action; and, 3) NAFTA will have significant effects on the human environment.

1. Agency

Pursuant to NEPA and the Council on Environmental Quality's regulations implementing NEPA (the CEQ Regulations),[7] USTR is an agency. The CEQ Regulations define "federal agency" to include

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[4]Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

[5]Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 370 (1989). NEPA also functions to ensure that other sub-federal governmental entities are appraised of the environmental impacts of proposals for federal legislation or major federal actions. 40 C.F.R. § 1506.6. Given that NAFTA's rules will apply to state and local environmental, health, and safety laws, as well as to federal laws, this aspect of the NEPA process is particular important with regard to NAFTA.

[6]42 U.S.C. § 4332(2)(c).

[7]The CEQ Regulations are considered "mandatory regulations applicable to all Federal agencies and are entitled to substantial deference." Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

"all agencies of the Federal Government."[8] As discussed in section II.A of this testimony, USTR is an agency for the purposes of the Administrative Procedure Act,[9] the act which provides for judicial review of agency decisions concerning NEPA. Moreover, USTR did not act alone here. More than fourteen other federal agencies, including the Departments of State, Commerce, and Justice, played a hand in creating NAFTA. USTR was merely the lead agency. The involvement of more than fifteen federal agencies in developing NAFTA clearly satisfies NEPA's agency requirement.

2. Action

NEPA applies to NAFTA because USTR's approval and initialing of NAFTA constitutes both a proposal for domestic legislation and a major federal action. Either one of these two conclusions alone would be sufficient to trigger NEPA's application to NAFTA, however, both are present here.

NEPA's plain language requires an EIS for "every recommendation and report on proposals for legislation."[10] Under the Trade Acts, Congress must accept NAFTA, as translated into a package of domestic legislation, without amendment or alteration.[11] Absent such Congressional approval NAFTA will not enter into force. Assuming NAFTA is approved, its terms will take their place in the U.S. Code beside all other federal laws. Thus, NAFTA is a specific and discernible proposal for domestic legislation. That the NAFTA package of legislation arises by way of an international agreement does not in any way diminish the essential legislative character of NAFTA.

USTR's initialing of NAFTA also amounts to a major federal action. The CEQ Regulations specifically provide that " . . . the adoption of official policy, such as . . . treaties and international conventions or agreements" constitute "major federal actions."[12] USTR's initialing of NAFTA—its agreement in principle to be bound by the terms and conditions of NAFTA—is clearly the adoption of an official position. NAFTA, as its own title admits, is an international agreement. In sum, NAFTA amounts to a comprehensive set of international legal obligations that will be used in enacting, implementing, and ultimately judging, a wide range of domestic federal, state, and local, policies, initiatives,

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[8]40 C.F.R. § 1508.12.

[9]5 U.S.C. §§ 500 et seq., and §§ 702-712.

[10]42 U.S.C. § 4332(2)(c).

[11]19 U.S.C. § 2191(d).

[12]40 C.F.R. § 1508.18(b)(1).

laws and regulations. The acceptance of these obligations is by both law and logic a "major federal action."

3. Effects

By the government's own admission, NAFTA will have a range of environmental impacts, some positive and others negative, on the quality of environment and human health and safety throughout the United States.[13] For example, the government's Interagency Review of U.S.-Mexico Environmental Issues notes that increased trade driven by NAFTA will: increase the amount of land transportation in the U.S.-Mexico border region, which will have adverse affects on air quality, noise pollution, and congestion; "have severe impacts on wetland and other aquatic wildlife habitats . . . .; and, impact "[a]bout 50 endangered species and over 100 'candidate' species in the border region and Northern Mexico."[14] These three examples of impacts alone demonstrate that NAFTA will have a significant effect on the human environment.[15] These environmental effects, and others caused by NAFTA, are precisely the types of significant environmental effects that NEPA has been used to evaluate for over twenty years.[16]

Moreover, the government recognizes in the Review that these environmental effects are the direct causal result of NAFTA.[17] Under a heading entitled "Possible Environmental Effects of NAFTA", the Review provides succinctly that "the number of Mexican pollutant-emitting facilities will increase; this will prompt Mexican commercial and residential pollutant increases that will affect the U.S. and will prompt concomitant increases in U.S.

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[13]See Interagency Review of U.S.-Mexico Environmental Issues (Feb. 1992) (the Review) (the Review contains over 200 pages of discussion of NAFTA's environmental effects).

[14]Id. at 5, 6, 8.

[15]See 40 C.F.R. §§ 1508.8 (defining effects); 1508.14 (defining human environment); 1508.27 (defining significant).

[16]See e.g. NRDC v. Hodel, 865 F.2d 288, 297 (D.C. Cir. 1988) (requiring that an EIS address effects of "simultaneous inter-regional development on migratory species."); Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1444 (9th Cir. 1992) (discussing EIS regarding impacts on endangered red squirrel); Robinson v. Knebel, 550 F.2d 422, 425 (8th Cir. 1977) (stating that allegation that "increased congestion would have an adverse effect on farming operations . . . clearly [fell] within the zone of interests protected by NEPA.").

[17]See, e.g., Review at 85.

sister cities as well."[18] The chain of direct causation linking NAFTA to increases in industrial pollutants and then to negative effects on U.S. citizens in cities like Nogales, Arizona, and Brownsville, Texas, could not be made more clear.

The presence of indirect environmental effects from NAFTA-driven macro-economic growth does not relieve USTR of the responsibility to prepare an EIS. USTR and some critics of the district court's decision have argued that because certain of NAFTA's effects will be the indirect effects of NAFTA-driven, macro-economic growth, USTR should be relieved of its responsibility to prepare an EIS for any of NAFTA's effects.[19] This argument is flawed in at least two respects. First, the CEQ Regulations provide, and the federal courts have confirmed, that NEPA requires a federal agency to examine the indirect environmental effects caused by federal actions that change "pattern[s] of land use, population density and growth rate, and related effects on air and water and other natural systems, including ecosystems."[20] Second, arguments about whether to cover indirect effects of NAFTA are irrelevant to the central issue of whether an EIS is required. These arguments go more properly to the ultimate scope of the EIS as opposed to the requirement to prepare an EIS.

C. Application of NEPA to NAFTA Comports With the Well-Established Body of Precedent that NEPA Applies to International Agreements

For more than twenty years Congress, the executive branch, and the judiciary have recognized that NEPA is fully applicable to international agreements with significant environmental impacts.[21]

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[18]Id.

[19]See, e.g., Brief of Appellants, Public Citizen v. United States Trade Representative, No. 93-5212, filed July 19, 1993, 49-50; Brief of Amici Curiae American Automobile Manufacturers Assoc. et al., Public Citizen v. United States Trade Representative, No. 93-5212, filed July 19, 1993, 24-25.

[20]40 C.F.R. § 1508.8(b); see also City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975) (cited with approval in Los Angeles v. Nat'l Highway Traffic Safety Admin., 912 F.2d 478 (D.C. Cir. 1990)); Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985).

[21]See National Environmental Policy Act and the Environmental Review of Trade Agreements: Hearings Before the Senate Committee on Environment and Public Works, 103 Cong., 1st Sess. 7 (Testimony of Nicholas C. Yost, publication forthcoming)(hereinafter "Yost Testimony") (Mr. Yost served as CEQ's General Counsel during the development of the CEQ Regulations). Similarly, this long-standing

The broad application of NEPA to proposals for international agreements, logically including trade agreements such as NAFTA, was never even raised as an issue during the inter-agency review of the CEQ Regulations.[22] Despite their "overall close scrutiny" of the proposed CEQ implementing regulations, neither the Department of State, nor the Department of Justice, nor USTR, ever commented on these provisions of the CEQ Regulations requiring an EIS for proposals for the ratification of treaties that the government now challenges.[23]

The responsibility to undertake an EIS for international agreements has been repeatedly recognized by the executive branch.[24] For example, the Final EIS for the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter

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recognition can also be seen in the lack of prior judicial challenges to the application of NEPA to international agreements. While the issue of NEPA's extraterritorial reach has been hotly contested by the Executive branch since the statute's enactment, see e.g. EDF v. Massey, 1993 U.S. App. LEXIS 1380 *12 (D.C. Cir. 1993), Greenpeace v. Stone, 748 F. Supp. 749 (D. Haw. 1990), NORML v. Department of State, 452 F. Supp. 1226 (D.C. D.C. 1978), there has been no reported challenges on the applicability of NEPA to any type of international agreement.

[22]Yost Testimony at p.7.

[23]Yost Testimony at p. 7; see also 40 C.F.R. § 1508.17.

[24]See Affidavit of David Wirth at 4, Plaintiffs Exhibit SS, Public Citizen v. United States Trade Rep., Civ. No. 92-2102 (CRR) (D.C. D.C. filed June 30, 1993). see also Final Environmental Impact Statement for the Renegotiation of the Interim Convention on the Conservation of North Pacific Fur Seals (1976); Final Environmental Impact Statement for the Ratification of the Proposed Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1973); Final Environmental Impact Statement for the Incineration of Wastes at Sea Under the 1972 Ocean Dumping Convention (1972); Draft Environmental Impact Statement for the Agreement Between the United States and Canada for the Conservation of Migratory Caribou and Their Environment (1980); Draft Environmental Impact Statement on the Interim Convention on the Conservation of North Pacific Fur Seals (1983); Draft Environmental Impact Statement for the Convention on the Conservation of Migratory Species of Wild Animals (1979); Draft Environmental Impact Statement on the Intercontinental Transport Agreements (1979); Environmental Impact Statement on the Montreal Protocol on Substances that Deplete the Ozone Layer (1988); Environmental Impact Statement on the World Heritage Convention (1973).

states that the EIS was "prepared in compliance with the requirements of [NEPA]."[25]

However, the clearest expression of the executive branch's historical recognition of the applicability of NEPA and the CEQ Regulations to international agreements can be found in the Department of State's regulations for the implementation of NEPA.[26] The Department of State's NEPA implementing regulations provide, in pertinent part, that "[l]egislative environmental impact statements on proposed treaties or legislation shall conform to the requirements of § 1506.8 of the CEQ Regulations and must be prepared in time for Congressional hearings and deliberations."[27]

In fact, EISs have long been prepared without protest or problem for a range of international agreements that raise equally serious foreign policy and international trade and investment issues as does a NAFTA EIS. They have been prepared not only for international agreements concerning the environment, but also for a host of agreements that address a myriad of political and economic issues.[28]

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[25]Final Environmental Impact Statement for the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter, 3 (1973).

[26]See 22 C.F.R. § 161.5(d).

[27]Id. (emphasis added). Similarly, within the specific context of international economic regulation, the regulations of the Federal Trade Commission implementing NEPA also incorporate by reference the CEQ Regulation's requirement that legislative proposals for international agreements must comply with NEPA. See 28 C.F.R. 61.7(b); 40 C.F.R. §§ 1506.8, 1508.17.

[28]See, e.g., Draft Environmental Impact Statement for the Compact of Free Association (1984) (Compact DEIS); Draft Environmental Impact Statement for the Third United Nations Law of the Sea Conference (1974); Draft Environmental Impact Statement on the Proposed Ocean Dumping Convention (1972); Environmental Impact Statement on the Convention on Prevention of Marine Pollution by Dumping Wastes (1973); Draft Environmental Impact Statement for the New Panama Canal Treaty (1977); Draft Environmental Impact Statement on the Interim Convention on Conservation of Migratory Species of Wild Animals (1983); Legislative Environmental Impact Statement for the Strategic Arms Reduction Treaty (START) (1991); Draft Final Impact Statement for the New Panama Canal Treaty (1977); Draft Environmental Impact Statement for the Third United Nations Law of the Sea Conference (1974); Final Environmental Impact Statement on the Negotiation of an International Regime for Antarctic Mineral Resources (undated).

Particularly illustrative of this point is the 1984 legislative EIS prepared for Congressional consideration of The Compact of Free Association (the "Compact"), an agreement between the United States and the Governments of the Pacific islands of Palau, the Marshall Islands, and the Federated States of Micronesia.[29] The Compact provided for an entirely new political status and a new basis for economic, political and military cooperation between the islands and the United States. Areas covered included: self-government, foreign affairs, security and defense relations, communications, immigration, international trade, grant and program assistance, and taxation. Subsidiary agreements to the Compact covered areas such as telecommunications, law enforcement and extradition, and the turnover of U.S. assets on the islands. Despite the national security, foreign affairs, trade and investment, and economic issues raised in the Compact, the Reagan administration complied with the NEPA requirements and prepared an EIS that addressed the environmental effects of all components of the Compact.

D. The Application of NEPA to NAFTA Does Not Conflict With Either the Substance or Intent of the Trade Acts.

There are no "clear and unavoidable statutory conflicts" between NAFTA and the Trade Acts that would vitiate the need for an EIS for NAFTA.[30] Flint Ridge and the CEQ Regulations permit the evasion of NEPA requirements only in those rare circumstances where "existing law applicable to the agency's operations . . . makes compliance impossible."[31] No such impossibility prevents the application of NEPA to NAFTA.

Like the Trade Acts, NEPA has interpreted to be essentially procedural in nature.[32] Thus, as the CEQ Regulations require,[33] the requirements of NEPA can easily be made to comport with those of the Trade Acts. The conflicts others have described between the statutory regimes of NEPA and the Trade Acts are red herrings. For

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[29]See Compact EIS.

[30]See Flint Ridge Dev. Co. v, Scenic Rivers Assoc., 426 U.S. 776, 787-88 (1976).

[31]Id.; 40 C.F.R. § 1500.6; see also Izaak Walton League 655 F.2d 346, 367 (D.C. Cir.) cert denied 454 U.S. 1092 (1981).

[32]See EDF v. Massey, 1993 U.S. App. LEXIS 1380 *12 (D.C. Cir. 1993) ("In many respects, NEPA is most closely akin to the myriad laws directing federal decisionmakers to consider particular factors before expanding aid or engaging in certain types of trade").

[33]40 C.F.R. § 1501.2.

example, some have argued that section 2155(g) of the Trade Acts, requiring confidentiality for information developed in trade negotiations, conflicts with NEPA's public disclosure requirements.[34]

This argument is patently erroneous. First, section 2155(g) only applies on its face to information during negotiations; the NAFTA negotiations are, however, completed.[35] Further, the requirement that trade information must be confidential does not conflict with the NEPA requirement that environmental information must be public. In fact, if such a conflict existed, USTR would have already violated section 2155(g) by making the Review public. The information developed under NEPA is not the same information developed under the Trade Acts. Thus, the presence of two different sets of rules for developing this information does not raise a conflict; information obtained under the Trade Act requirements will remain confidential, information obtained under NEPA will be made public. Simply put, NEPA public disclosure rules will not apply to Trade Act information nor vice versa.

Further, the Trade Acts do not preclude other legislation. Where Congress intends for NEPA to give way, Congress can, and does, specifically express this intention into law. For example, the Trans-Alaska Pipeline Authorization Act specifically provided that NEPA did not apply to the Alaska Pipeline.[36] The Trade Acts fail to exempt NAFTA from NEPA.

Moreover, the Trade Acts themselves require the substantive act of gathering information to allow for informed decision making.[37] Similarly, NEPA's goal is to provide valuable, necessary, and timely information to decisionmakers. These

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[34]See Brief of Amici Curiae American Automobile Manufacturers Association et al., Public Citizen v. United States Trade Representative, No. 92-2102 (CRR), at 27-29; see also 19 U.S.C. 2191(d). The brief of Amici Curiae American Automobile Manufacturers Association et al. refers to the confidentiality provisions of section 2191(d), id., however, the confidentiality provisions appear in section 2155(g).

[35]19 U.S.C. § 2155(g).

[36]Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 203, 87 Stat. 576, 585 (1973); see also Department of Interior and Related Agencies Appropriations Act of 1989, Pub. L. No. 100-446, § 321, 102 Stat. 1774, 1827 (1988).

[37]Massey, 1993 U.S. App. LEXIS 1380 *12 (D.C. D.C. 1993); see also, e.g., 19 U.S.C. §§ 2151, 2155, 2211, 2903(a).

mandates conform, they do not conflict. The only difficulties that could possibly arise are ones of timing and as a factual matter no such conflicts exist.

E. A Legislative EIS for NAFTA Would Fulfill the Requirements of NEPA

Given the particular facts of NAFTA, a "legislative" EIS (LEIS) would appropriately fulfill the requirements of NEPA.[38] LEISs have proven successful at analyzing, even under tight time constraints, the environmental impacts of other international agreements. For example, an LEIS for the Montreal Protocol, a complex multilateral treaty with both trade and environmental implications, was prepared in roughly a two-month time period.[39]

Similarly, an expedited and streamlined LEIS process for NAFTA could be made compatible with both the fast-track procedures and the Clinton administration's self-imposed NAFTA schedule. Fast track rules for Congressional consideration of NAFTA require House and Senate votes on the implementing package within 60 legislative days of introduction of the legislation, or within 90 legislative days if the package includes revenue measures.[40] An LEIS forwarded to Congress within 30 days of transmittal of NAFTA, as required under the CEQ Regulations, would fit within these fast-track time frames and would also allow ample time to integrate the LEIS into Congressional consideration of NAFTA.

Moreover, an LEIS on NAFTA begins with a leg up. NAFTA's environmental effects has been the topic of a wide range of governmental and non-governmental studies. While these efforts do not fulfill NEPA's requirements, they provide much of the factual raw materials from which USTR could in short order craft an objective LEIS. What remains is for the agency to take on the task of addressing the specific issues that are mandated under NEPA and the CEQ Regulations.[41] Here again, NAFTA has a head start. USTR

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[38]See 40 C.F.R. § 1508.17. This statement does not in any way concede that, based upon different factual circumstances, an LEIS will always be the appropriate form of NEPA review for other trade agreements.

[39]52 Fed. Reg. 45,520-21 (Nov. 30, 1987).

[40]19 U.S.C. §§ 2903(a)(1); 2191(c)(1),(e)(1).

[41]See, e.g., 40 C.F.R. §§ 1502.14, 1502.16(d) (alternatives); 1508.7, 1508.8 (cumulative impacts); 1502.14(f), 1502.16(h) (mitigations measures).

has already begun the process of reorganizing, updating and supplementing existing information in order to meet the NEPA requirements.[42]

II. Application of NEPA to NAFTA Is Proper Under Both the Constitution and the APA

USTR's approval and initialing of NAFTA was a "final action" of an "agency" for the purposes of the APA and therefore judicial review of USTR's actions is appropriate. Since USTR's extensive work on NAFTA was an agency action, judicial review does not encroach on the powers of the President. Thus, review is not precluded by the separation of powers.

A. USTR is an Agency Under the APA

USTR is an "authority of government" and, as such, it is an agency for purposes of the APA. In order for a court to have the authority to review USTR's failure to prepare an EIS, USTR must be an agency for the purposes of the APA. The APA provides for judicial review of "each authority of government" except Congress, the judiciary and the territorial and District of Columbia governments.[43] While the APA implementing regulations and the case law preclude APA review of the President and his immediate, personal staff, it is also clear that this Presidential exception applies only where a government entity functions solely as an adviser to the President.[44] Thus, where an entity of government, in addition to advising the President, conducts other independent activities, its actions are reviewable under the APA. USTR conducts a wide range of independent functions including: coordinating the implementation of trade policy; conducting trade and direct investment negotiations; reporting to Congress; conducting investigations as to foreign trade practices; and, where appropriate, applying trade sanctions to such practices.[45] In

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[42]See Letter from Bradley M. Campbell, Dept. of Justice, to Patti A. Goldman, Public Citizen, July 27, 1993.

[43]5 U.S.C. § 551(1).

[44]See, e.g., Energy Research Found. v. Defense Nuclear Facilities Safety Bd., 917 F.2d 581, 584 (D.C. Cir. 1990); Soucie v. David, 448 F.2d 1067, 1073, n. 15, 1075 (D.C. Cir. 1971).

[45]19 U.S.C. §§ 2171(c)(1)(A); 2171(c)(1)(C); 2171(c)(1)(H); 2171(d)(1). Professor Tribe asserts that requiring USTR to prepare an EIS for NAFTA would be no less an intrusion into presidential powers as requiring the President's speechwriter to prepare an EIS for a state of the Union Address. See Laurence H. Tribe, NEPA, NAFTA and the Separation of Powers, Prepared Statement Before the Senate Committee on Environment and Public Works, July 22, 1993, at

addition, like the heads of other agencies—but unlike members of the President's core personal staff—the USTR is appointed by the President with advice and consent of the Senate.[46] Similarly, USTR is subject to the Freedom of Information Act, while the President and his core staff are exempt from the act.[47]

Nor is USTR an "extension of the President for purposes of NAFTA's introduction to Congress . . . ."[48] In negotiating NAFTA, USTR acted pursuant to a specific mandate from Congress, not mere instruction from the President.[49] USTR developed U.S. positions on various sections of the agreement with little or, in many cases, no input from the President.[50] These independently crafted positions are now memorialized in the terms of NAFTA. Even the broad goals USTR took into the NAFTA negotiations are products of the Congress not the President.[51] It is hard to imagine how USTR is an extension of the President for NAFTA purposes when USTR, by statute, reported to Congress on NAFTA; acted pursuant to Congressional authority in negotiating NAFTA; followed Congressional goals in negotiating NAFTA; and, independently crafted, negotiated and agreed to NAFTA provisions.

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4. This assertion serves only to obfuscate. Clear distinctions exist between the speechwriter in Professor Tribe's example, and the USTR here. For example, the speechwriter does not have a duty to report to Congress, USTR does. 19 U.S.C. § 2171 (c)(1)(H). The speechwriter is not appointed with advice and consent, USTR is. 19 U.S.C. § 2171(g). The speechwriter does not have the independent authority to speak as a representative of the United States, USTR does. 19 U.S.C. § 2171(c)(1)(C). If, however, the speechwriter's State of the Union proposal was later taken up by an agency and finalized into a proposal for legislation or a major federal action with significant affects on the human environment, then Professor Tribe's analogy would be on point. 42 U.S.C. § 4332(2)(c). The duty to prepare the EIS would, however, fall upon the agency and not the President's speechwriter. Id.

[46]19 U.S.C. § 2171(b)(1).

[47]15 C.F.R. §§ 2004, 2005. The president and his core staff are immune from the Freedom of Information Act. See Rushforth v. Council of Economic Advisors, 762 F.2d 1038, 1040-41 (D.C.Cir. 1985).

[48]Tribe Testimony, supra n. 45, at 4.

[49]19 U.S.C. § 2171(a)(1)(C).

[50]Public Citizen supra n. 2, at 8.

[51]19 U.S.C. §§ 2113, 2114.

The NAFTA spans some twenty two chapters and numerous annexes that provide the rules of trade in sectors ranging from intellectual property to food safety, and private investment to government procurement. Given the sheer breadth of NAFTA's provisions, it is obvious that USTR, and not the President and his personal staff, had responsibility for NAFTA. While the President may have occasionally participated in certain NAFTA decisions, this is typical of agency decisionmaking. In fact, one would hope that the President would play an oversight role concerning most important agency decisions, including NAFTA. The President's occasional attention to NAFTA notwithstanding, the laboring NAFTA oar was pulled by USTR acting as an agency of the federal government under the APA.

B. USTR's Negotiation, Conclusion and Initialing of NAFTA Is "Final" Action.

USTR's approval and initialing of NAFTA is final action under Franklin v. Massachusetts.[52] Franklin provides that "final action" depends on whether "the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."[53] In Franklin the Court focused on the fact that the President retained the ability to alter or amend the census in finding that no final action existed. USTR's initialing of NAFTA concluded the executive branch's NAFTA decision making process by fixing the terms of the agreement, which in turn fixed the terms of the domestic NAFTA implementing legislation. This conclusion is required under federal law, which provides that NAFTA must be presented to Congress for a vote of acceptance without amendment or alteration.[54]

USTR's actions with regard to NAFTA also fulfill the other factors set out in Franklin for final action. In Franklin, the Court also stressed that neither "tentative" rulings nor rulings by "subordinate officers" can be considered final action.[55] NAFTA, as discussed above, is a fixed target, its terms and conditions are known and not subject to change.[56] Moreover, the President himself has repeatedly stated his intention to move forward with this NAFTA

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[52]112 U.S. 2767, 2773 (1992).

[53]Id.

[54]19 U.S.C. § 2191(d).

[55]Franklin, 112 U.S. at 2773, citing Abbott Laboratories v. Gardner, 387 U.S. 136, 152 (1967).

[56]See 19 U.S.C. § 2191(d).

agreement.[57] NAFTA is not "tentative" in any respect. Further, the USTR, who holds the rank of "Ambassador Extraordinary,"[58] is clearly not a subordinate officer.

Furthermore, while the President maintains the ability to present NAFTA to Congress this task is solely a ministerial formality. Nothing the President can do in presenting NAFTA can change the terms and obligations of the agreement USTR initialed.[59] Under Franklin it is USTR's initialing of the terms of the agreement, not the formality of the President's submission of these preconceived terms, that constitutes the final action here.[60] Finally, if the mere formality of Presidential submission to Congress of a course of action pre-determined by a federal agency, prevents Congress from regulating the activities of the acting agency, and courts from reviewing these agency actions, domestic administrative law and practice would be entirely re-crafted—and not for the better.

C. Judicial Review Does Not Conflict with the Separation of Powers Doctrine.

The requirement that USTR must prepare an EIS does not encroach upon the powers of the President. Under Nixon v. Admin. of Gen. Services[61] USTR must prepare an EIS unless the preparation of an EIS "prevents the executive branch from accomplishing its assigned functions." The President, however, has no explicit powers over international trade per se.[62] Under the Constitution

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[57]See, e.g., Alan Toulin & Jill Vardy, Trade Officials Say NAFTA Deal Is Alive and Well, Fin. Post, July 1, 1993, 5.

[58]19 U.S.C. § 2171(b)(1).

[59]19 U.S.C. § 2191(d).

[60]Franklin, 112 U.S. at 2773 (finality exists when the agency first expresses its final opinion as to a course of action and that opinion will have an effect on the parties).

[61]433 U.S. 425, 443 (1977); see also Morrison v. Olsen, 487 U.S. 654, 693 (1988).

[62]Thus, the President's authority to recommend legislation, U.S. Const., Art. II, § 2, cl. 3, and "inherent" powers over foreign affairs, United States v. Curtiss Wright Export Co., 299 U.S. 304 (1936), renders the authority over international trade at most a "shared power." Moreover, many scholars question whether the President has such "inherent powers" over foreign affairs. See, e.g., Louis Henkin, Foreign Affairs and the Constitution, 66 For. Affairs 284 (1988); Arthur Schlesinger, Congress and the Making of American Foreign Policy, 51 For. Affairs 78 (1972).

Congress has the explicit authority to both "regulate commerce with Foreign Nations," and to "lay and collect Taxes, Duties, Imposts and excises."[63] Any novel reading of the Constitution that would insulate the executive branch's trade dealings from Constitutionally mandated Congressional oversight would fly directly in the face of the original intent of framers of the Constitution.

Further, as a factual matter the requirement to prepare an EIS does not conflict with either the President's authority to present legislation,[64] or his "inherent" foreign affairs powers.[65] The conduct of foreign affairs with regard to NAFTA is completed; the agreement is signed and nothing, absent renegotiation, can alter or amend its terms and obligations.[66] All that remains is the domestic task of Congress either accepting or rejecting NAFTA's fixed terms. Moreover, neither NEPA, nor the decision and order in Public Citizen,[67] prevent the President from presenting NAFTA to the Congress. NEPA's EIS requirement, and the district court's order and opinion, merely prescribe a set of procedures that USTR must follow as the lead agency to ensure that Congressional consideration of the agreement is informed.

Further, and in the alternative, if the requirement of an EIS does in some narrow sense encroach on the President's powers, this encroachment is "justified by an overriding need to promote objectives within the constitutional authority of Congress."[68] The objectives of Congress clearly embrace the following: the oversight of foreign commerce, including international trade policy and agreements;[69] the authority to oversee the international obligations of the United States;[70] and, the authority to enact all necessary and proper laws, including laws for the protection of

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[63]U.S. Const., Art. I, § 8, cl. 3.

[64]U.S. Const., Art. II, § 2, cl. 3.

[65]See United States v. Curtiss Wright Export Co., 299 U.S. 304 (1936).

[66]19 U.S.C. § 2191(d) (prohibiting amendments or alterations to NAFTA).

[67]Supra n. 2, at 21. Order, Public Citizen v. United States Trade Representative, No. 92-2102 (CRR), filed Jun 3 30, 1993, 1-2.

[68]Nixon, 433 U.S. at 433.

[69]U.S. Const., Art. I, § 8, cl. 3.

[70]Id. at Art. II, § 2, cl. 2 (vesting authority to ratify treaties with the Senate).

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American citizens and their environment, as well as the NAFTA implementing legislation.[71]

The conclusion that the doctrine of separation of powers precludes Congressional oversight and judicial review here must be viewed in light of its affects on the long-standing delicate balance of powers under the Constitution. A finding that Congress cannot regulate, and the courts cannot review, the actions of USTR here would vest the President and the rest of the executive branch with nearly absolute and unfettered authority over foreign affairs and international trade. This is precisely what the founding fathers sought to avoid by providing a system of checks and balances in both international trade and foreign affairs relating to international agreements.

Conclusion

Commentators have likened NEPA to the environmental Magna Carta.[72] While not perfect, this analogy is nevertheless illuminating. NEPA is in many ways similar to a bill of procedural environmental rights enjoyed by the American public. NEPA's primary purpose—to ensure that decision makers and the American public are aware of the environmental considerations of their actions—is particularly appropriate to NAFTA. The NAFTA debate has raised serious issues regarding the effects of the agreement on the environment, and public health and safety. The government, in particular the Clinton administration, is to be credited for its efforts to raise and address these environmental concerns. We are, however, about to embark upon the final step in the NAFTA process, a step that will create serious binding legal obligations upon the United States, and will have significant impacts on our environment. By law, such a step requires the systematic review of these environmental issues in the form of a NEPA mandated LEIS. Nothing in the Constitution or any other U.S. laws vitiates NEPA's requirement that an LEIS be prepared.

We recognize that the preparation of a LEIS will require a significant commitment of resources in order to keep NAFTA on the administration's self-imposed time schedule. However, it remains a fact that the administration can fulfill the requirements of NEPA without compromising its schedule for NAFTA implementation. Although NEPA's requirements may be inconvenient for the administration, these inconveniences are the small and inconsequential costs of democratic government.

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[71] Id. at Art. I, § 8, cl. 18.

[72] See, e.g., Daniel Mandelker, NEPA Law and Litigation, 1:01, at 1 (1990).

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